Vanderbilt Journal of Transnational Law

Volume 9
Issue 1 *Winter 1976*

Article 6

1976

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RECENT DECISIONS

ADMIRALTY—IMPLIED WARRANTY OF WORKMANLIKE PERFORMANCE—ONE WHO CONTRACTS TO PROVIDE MARITIME SERVICES IMPLIEDLY AGREES TO PERFORM IN A DILIGENT AND WORKMANLIKE MANNER

Plaintiffs[1] sought recovery for damages to their vessel resulting from its grounding on a dike. Due to tide and wind conditions the vessel was unable to make way while trying to come into port to take on bunkers (fuel oil), and her pilot radioed for tug assistance. The tugs, which were provided by the defendant[2] as an incident of a contract between plaintiffs and defendant for bunkers, closed with the vessel but failed to attach tow lines, and she subsequently drifted aground.[3] Plaintiff alleged that defendant had contracted to furnish, among other things, tug assistance and pilotage and that this contract contained an implied warranty of workmanlike performance which was breached as a result of the tugs' conduct. The defendant denied the existence of the implied warranty in the contract or, alternatively, that the implied warranty had been breached.[4] The district court judge held for the plaintiffs, reasoning that the tugs were in the best position to prevent the accident[5]

1. Fairmont Shipping Corporation and Fairwinds Ocean Carrier Corporation were seeking to recover damages suffered by their steamship *Western Eagle*.

2. Chevron International Oil Company (Chevron) offered a host of services to ships taking on bunkers at Flushing, Netherlands, in an attempt to make Flushing an attractive port for resupply of bunkers. Tug assistance was actually provided by Chevron's subcontractor or agent, Steenkolen Handelsvereeiging (SHV).

3. The two tugs *Sophia* and *Fredrik Hendrik* proceeded from port as soon as they were called upon. They approached the *Western Eagle* in the dark in a dense fog, according to the testimony of the tug captains, and while attempting to attach lines had to veer away due to traffic on the river. By the time tow ropes were finally attached, the *Western Eagle* was aground.

4. Chevron did not challenge on appeal the finding that it was obligated under the bunker supply contract to provide tug assistance. 511 F.2d 1252 (2d Cir. 1975). In the lower court Chevron denied in the alternative, the existence of the contract, the existence of any clause in the contract for pilotage or towage, any implied warranty, or any conduct by the tugs which constituted a breach of any warranty. 371 F. Supp. 1191 (S.D.N.Y. 1974).

5. This rationale was established by the Supreme Court in a stevedoring case, *Italia Societa per Azione di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). The Court in *Italia* implied that the issue of breach of contract turned on a factual determination, placing liability upon the party best situated to adopt preventative measures and thereby reducing the likelihood of injury. 376 U.S. at

and, by failing to adopt measures to prevent it, breached the implied warranty. The United States Court of Appeals for the Second Circuit, *held* affirmed. An implied warranty of workmanlike performance exists in maritime service contracts as in other service contracts where one who contracts to provide services impliedly agrees to perform in a diligent and workmanlike manner. *Fairmont Shipping Corporation v. Chevron International Oil Company*, 511 F.2d 1242 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3202 (U.S. Oct. 6, 1975).

The implied warranty of workmanlike performance was originally incorporated into maritime service contracts by the courts to help mitigate the shipowner's exposure to liability under section 933 of the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA),[6] under which a longshoreman injured while working aboard a ship may elect to sue the shipowner in tort. In *Seas Shipping Co. v. Sieracki*,[7] a suit brought against a shipowner under the section 933 election, the Supreme Court said that the shipowner's liability arose under the doctrine of unseaworthiness which created an absolute duty, not turning on fault, owed by the shipowner to furnish a seaworthy ship for longshoremen.[8] Several cases subsequent to *Sieracki* broadened the scope of the doctrine of unseaworthiness[9] and thus significantly increased the ship-

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324. Through this rationale the Court in *Italia* was able to place 100 per cent of the loss on the stevedoring company by allowing indemnification, even though the stevedoring company had non-negligently provided inadequate equipment.

6. Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, *as amended*, 33 U.S.C. § 901 *et. seq.* (1970) [hereinafter cited as LHWCA]. The LHWCA made employers liable without fault to compensate their employees for injuries that were work connected. In return for this statutory remedy the longshoremen were precluded by the section 905 exclusivity provisions from seeking recovery based on any tort liability of the employer to the employee. Section 933 allowed the longshoreman to elect to seek a remedy against a third party who might be liable for his injury in lieu of seeking the statutory remedy from his employer. It has been held that after accepting compensation payments from his employer without an award, the longshoreman may sue a third party tortfeasor for his injuries, with the employer being indemnified out of any award recovered. American v. Porello, 330 U.S. 446 (1947).

7. 328 U.S. 85 (1946). The Supreme Court held that longshoremen were "seamen" insofar as that status made them persons to whom a duty to provide a seaworthy ship was owed by the shipowner.

8. The unseaworthiness doctrine's applicability to stevedoring suits has been eliminated by the 1972 amendment to the LHWCA. Section 905(b), added by the amendment, provides that shipowners cannot be held liable to longshoremen on the basis of the warranty of seaworthiness or a breach of that warranty.

9. *See, e.g.*, Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1954) (an unu-

owner's exposure to liability for tort claims. The Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*[10] denied contribution to the shipowner from a longshoreman's employer who was a joint tortfeasor. The combination of *Sieracki* and *Halcyon* put the shipowner in the impossible position of being solely liable for any injury which could conceivably exceed the LHWCA statutory award. In apparent recognition of the shipowner's untenable position, the Supreme Court, in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[11] allowed a shipowner full indemnity for negligence chargeable to a stevedore-employer which resulted in injury to a longshoreman.[12] The Court found an implied warranty of workmanlike performance, which allowed the shipowner to seek indemnification from the stevedore-employer on a breach of contract theory and thus avoid the exclusive remedy provision of section 905 of the LHWCA.[13] *Ryan* was an attempt by

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sually cantankerous deck man who, while drunk, attacked the plaintiff with a knife, rendered the ship unseaworthy); Lahde v. Societa Armadora del Norte, 220 F.2d 357 (9th Cir. 1955), *cert. denied*, 350 U.S. 825 (1956) (ship was deemed unseaworthy when plaintiff fell through an open hatch unseen in the dim light).

10. 342 U.S. 282 (1952) (the stevedore-employer was found to be 75 per cent responsible for the longshoreman's injury, the shipowner 25 per cent responsible.)

11. 350 U.S. 124 (1956). The longshoreman was injured when an insufficient wooden brace for a roll of pulpboard gave way. The evidence showed that the pulpboard roll that injured the longshoreman had been improperly stowed by the contractor at the previous port. The Court distinguished *Halcyon* by pointing out that it dealt with contribution and not indemnification.

12. For a comprehensive discussion of this indemnification principle and cases prior to and following *Ryan* see G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-55 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]. *See also* Comment, *Workmen's Compensation: Federal Longshoreman's and Harbor Workers' Compensation Act: Shipowner's Right to Indemnity Against Employer*, 44 CALIF. L. REV. 800 (1956); Stover, *Longshoreman-Shipowner-Stevedore: The Circle of Liability*, 61 MICH. L. REV. 539 (1963); White, *A New Look at the Shipowner's Right-Over for Shipboard Injuries*, 12 STAN. L. REV. 717 (1960); Comment, *Indemnity—Stevedore's Warranty of Workmanlike Service Extends to Latent Defects in Equipment He Provides*, 32 GEO. WASH. L. REV. 893 (1964).

13. The Court carefully noted that it was not required to deal with the exclusive remedy provision of the LHWCA with regard to an action against the employer. 350 U.S. at 132. The Court felt that the LHWCA protected the employer only from claims arising from tortious conduct causing injury to the employee, but gave no relief from contractual obligations voluntarily assumed. This rationale has been reached in state courts in cases dealing with workmen's compensation. *See* Westchester Lighting Co. v. Westchester County Corp., 278 N.Y. 175, 15 N.E.2d 567 (App. Div. 1938); 2 A. LARSON, WORKMEN'S COMPENSATION LAW, §§ 76.00-76.44(a) (1975). *See generally* Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. PITT. L. REV.

the Court to even out the burden between the shipowner and other joint tortfeasors, but the aftermath of *Ryan* has been the opposite extreme from the earlier sole liability of the shipowner. For example, in *Italia Societa per Azione di Navigazione v. Oregon Stevedoring Co.*[14] the Court awarded complete indemnification to a shipowner when the employer of an injured longshoreman was in no way negligent. The Court in *Ryan* indicated that recovery on the breach of a contractual obligation such as an implied warranty may turn upon the standard of performance by the contractor but this fact does not change the nature of the action into tort.[15] This standard of performance for determining breach of contract also has given courts difficulty. In *Italia* no negligence was required while in *Bouchard Transportation Co. v. Tug Gillen Brothers*[16] the District Court for the Southern District of New York held that negligence was required for a breach of an implied warranty in a towage contract. The *Ryan* decision was brought about by a desire to settle the issue of indemnity between a shipowner and a stevedore-contractor,[17] and until recently the *Ryan* principle of implied warranty of workmanlike performance has been applied only in cases dealing with claims for indemnification from third parties.[18] But a warranty of workmanlike performance similar to

321 (1954). The exclusivity provision of § 905 was nullified by the Court in *Reed v. The Yaka*, 373 U.S. 410 (1963), through the device of declaring a bareboat charterer the owner *pro hac vice* of the vessel, making the employer the shipowner, and allowing the injured employee to sue him in that capacity, LHWCA § 905 exclusivity notwithstanding. This nullification of a statute by the courts has generated much comment. *See* GILMORE & BLACK § 6-56; Comment, *Risk Distribution and Unseaworthiness*, 75 YALE L.J. 1174 (1966); Note, *Personification of Vessels*, 77 HARV. L. REV. 1122 (1964).

14. *See* note 5 *supra*. The Court said that "[T]he absence of negligence on the part of the stevedore . . . is not fatal to the shipowner's claim of indemnity . . . ."

15. 350 U.S. at 134.

16. 389 F. Supp. 77 (S.D.N.Y. 1975). For a pre-*Ryan* discussion of the standard of performance see Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. PITT. L. REV. 321 (1954).

17. Long, *Stevedoring Agreements and the Warranty of Workmanlike Service*, 23 INS. COUNSEL J. 170 (1956).

18. *See* note 21 *infra*. In *Bouchard Transportation Co.*, 389 F. Supp. 77 (S.D.N.Y. 1975), a case decided on January 24, 1975, only ten days prior to the instant case, the district court held that the owner of a petroleum barge could recover for damages which resulted from its barge going aground while under tow by the defendant's tug. The barge owner brought action against the tug, the tug owners, and a wharfinger based on a contract for tow between the barge owner and the towing company. The district court held that the pilot of the tug was

that of *Ryan*[19] has been implied in maritime service contracts involving towage. In *James McWilliams Blue Line, Inc. v. Esso Standard Oil Co.*[20] the court relied on *Ryan* to recharacterize a suit, in which a time charterer of a barge sought to implead a tug owner for damages claimed by the charterer in possession, from one of impleader to one of indemnity. The cases following the *Blue Line* application of the implied warranty principle to towage contracts[21]

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negligent in his work, that the towing company had accordingly breached its warranty to tow the barge in a safe and workmanlike manner, and that the wharfinger was negligent in failing to provide a safe approach to the terminal. The district court cited *Blue Line* in finding an implied warranty saying that the "very nature of a towage contract necessarily implies an obligation to tow properly, safely and competently." 389 F. Supp. at 82. The court cited *In re Moran Inland Waterways Corp.*, 320 F. Supp. 229 (S.D.N.Y. 1970), *rev'd*, 449 F.2d 132 (2d Cir. 1971), in its discussion of the manner in which to treat the implied warranty and dealt with the warranty as requiring negligence for breach.

19. Ironically, while the exact situation giving birth to *Ryan* is statutorily exempted, *see* note 8 *supra*, the doctrine lives on. *See, e.g.*, H & H Ship Service Co. v. Weyerhause Line, 383 F.2d 711 (9th Cir. 1967) (ship cleaning contract); Mortensen v. A/S Glittre, 348 F.2d 383 (2d Cir. 1965) (ship painting); Dunbar v. Henry Du Bois' Sons Co., 275 F.2d 304 (2d Cir. 1960), *cert. denied*, 363 U.S. 815 (1960) (towage contract).

20. 245 F.2d 84 (2d Cir. 1957). The charterer in possession stood in the place of the barge owner and was seeking recovery for damages which the barge suffered while under time charter. The time charterer impleaded the tug owner whose tug was towing the barge when it was damaged. The court seized on the doctrine of implied warranty of workmanlike performance to enable it to sidestep the central issue in the case which was the effect of laches on the time charterer's petition of impleader. While laches might have barred recovery under a theory of negligence with a three year period of limitation under state statute, recovery would have been allowed on a theory of breach of contract with a six year period of limitation. Adopting the breach of implied warranty as the basis for the impleader allowed the court to eliminate the laches issue.

21. *In re* Moran Inland Waterways Corp., 320 F. Supp. 229 (S.D.N.Y. 1970) (tug owner sought indemnification from the barge owner or contribution from the barge owner for amount the tug owner paid in settlement of claim for death of bargeman and damage to the barge, and the barge owner sought contribution from tug owner for amount the barge owner contributed to the settlement of the death claims); United States v. The Manzanillo, 190 F. Supp. 229 (D. Ore. 1960) (action by shipowner against tug and owner for amounts paid to ship captain who was injured on tug), *aff'd*, 310 F.2d 220 (9th Cir. 1962) (entire amount of maintenance and cure paid to ship captain by shipowner was recoverable); T.J. Stevenson & Co. v. George W. Whiteman Towing, Inc., 331 F. Supp. 1038 (E.D. La. 1970) (shipowner brought action for indemnity from tugowner where tug was liable for a defective heaving line which caused injury to a crewman of the shipowner's vessel in breach of implied warranty of workmanlike performance); B. Tibbs v. Baker-Whitely Towing Co., 271 F. Supp. 529 (D. Md. 1967) (United

have adopted all the extensions of the *Ryan* decision.[22] The *Ryan*-type indemnity springs from the shipowner's strict liability for unseaworthiness[23] with the result that the shipowner is exposed to liability regardless of fault[24] but is able to pass this liability on to the employer-contractor through the vehicle of an implied warranty of workmanlike performance.[25]

In the instant case the court's analysis of the background of *Ryan* showed clearly that this was not a *Ryan*-type case.[26] The

States entitled to indemnity from tug owner for recovery paid by United States to shipowner whose ship had been seized by United States Marshall and was damaged while being moved by tug under oral contract with United States Marshall); Texas Co. v. The Margret A. Moran, 375 F. Supp. 375 (S.D.N.Y. 1959) (towing company was entitled to a decree over against the owner of tug who had leased the tug on a time charter to towing company, the court, refusing to follow *Blue Line*, held that the suit rested on a theory of tort negligence).

22. Subsequent to *Ryan* it was held in *Drago v. A/S Inger*, 194 F. Supp. 398 (E.D.N.Y. 1961), that attorneys' fees incurred by the shipowner in attempting to defend against the plaintiff's claim were part of the indemnity recoverable. A further development in *Caswell v. Koninklyke Nederlansche Stoomboot Maalschappy*, 205 F. Supp. 295 (S.D. Tex. 1962), allowed the shipowner to recover all damages resulting from the breach of warranty, even where successfully defended against plaintiff's claim. Attorneys' fees and damages for breach in cases where the main claim had been successfully defended against were not made part of the indemnity in towage contract cases until *Singer v. Dorr*, 272 F. Supp. 931 (E.D. La. 1967). The court in *Singer* held that all the ramifications of the *Ryan* doctrine should apply to the towage situations, despite the fact that the plaintiff could sue the tug owner directly, while in the *Ryan* situation the plaintiff was barred by the § 905 exclusivity provision of the LHWCA from suing the stevedoring company. The court in *Singer* based its holding on the rationale that the *Ryan* doctrine was conceived to equitably place the burden of defending and paying claims on the party who was in control and whose actions resulted in the claim being brought rather than on the party technically liable, and there was no reason not to make the same equitable adjustment in the towage situation.

23. *E.g.*, Schwartz v. Compagnie Générale Transatlantique, 405 F.2d 270 (2d Cir. 1968) "[A]ny equitable considerations underlying the decision of the courts to require indemnity by applying the implied warranty of workmanlike service are ultimately derived from a shipowner's liabilities under the seaworthiness guarantee . . . ." 405 F.2d at 276. This position was supported by the Ninth Circuit Court of Appeals when it held in *Davis v. Charles Kruz & Co.*, 483 F.2d 184 (9th Cir. 1973), that *Ryan* was inapplicable because the shipowner's unseaworthiness liability had been removed while the vessel was in a repair facility and was a dead ship.

24. *See* note 7 *supra*.

25. Italia Societa per Azione di Navigazione v. Oregon Shipping Co. 376 U.S. 315 (1964).

26. The court made this very observation. 511 F.2d at 269.

court indicated that the primary issue in *Ryan* was the indemnification of the shipowner, with the implied warranty of workmanlike performance providing the means by which the indemnification could be allowed. The court pointed out that the question of whether a warranty creates an obligation to indemnify (the *Ryan* issue) is entirely separate from the question of whether a contract includes a warranty of workmanlike performance (the issue in the instant case). The court did not feel compelled to determine if an implied warranty of workmanlike performance, such as exists in non-maritime service contracts,[27] was applicable to maritime service contracts because by its reasoning *Ryan* had already made the determination that such a warranty was applicable. The court took the view that maritime service contracts are no different than non-maritime service contracts, at least as far as an implied warranty of workmanlike performance is concerned. Here the court saw its task as quite simply determining whether an implied warranty of workmanlike performance existed in the contract at hand. The court found an implied warranty of workmanlike performance in the instant contract and then it only remained for the court to determine whether or not the warranty was breached. The court adopted the rationale of *Italia* that a warranty of workmanlike performance can be breached by non-negligent as well as negligent conduct.[28] The court applied the "clearly erroneous" rule[29] to the district court's fact finding and affirmed the lower court's holding that there was a breach of the implied warranty. The court further held that plaintiffs' own negligence would have been a bar to their claim only had it been an "active hindrance" to the defendant's performance.[30] The court found no such hindrance in the instant case.

Judge Mansfield, in dissent, did not accept the majority's inter-

27. 9 S. WILLISTON, CONTRACTS § 1012(c), at 36-39 (3d ed. Jaeger ed. 1967). *See, e.g.*, Wilham Beadenkopf Co. v. Henwood & Newark, Inc., 14 F.2d 125 (D. Mass. 1926) (contract to tan goat skins); *In re* Estate of Talbott, 184 Kan. 501, 337 P.2d 986 (1959) (contract to install plumbing); Henggeler v. Hindra, 191 Neb. 317, 214 N.W.2d 925 (1974) (construction contract).

28. For a discussion of the *Italia* rationale *see* note 5 *supra*.

29. FED. R. CIV. P. 52(a) provides: "[F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." *E.g.*, Hart v. Blakemore, 410 F.2d 218 (5th Cir. 1969).

30. *See* Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 346 F.2d 481, 484 (2d Cir. 1965), *rev'd on other grounds*, 382 U.S. 283 (1965); *See generally* 9 S. WILLISTON, CONTRACTS § 1012(c), at 36-39 (3d ed. Jaeger ed. 1967).

pretation of the implied warranty as to its nature or extent. He felt that since the plaintiffs' ship was never under the defendant's control, defendant's tugs were not required to exercise more care than could have been reasonably required of them[31] under the traditional approach to breach of towage contracts.[32] He did not accept the district court's fact finding as sufficient to establish negligence under a standard of reasonable performance.

In the instant case the court took the position that recovery for damages which occur during towage is founded in contract through an action for breach of an implied warranty. This is a departure from the traditional approach in admiralty which has been to regard the recovery of such damages as based on tort.[33] It would appear that by adopting a contract approach and then applying a standard that requires no negligence for breach the court has made the breach of an implied warranty for workmanlike performance the occasion for imposing strict liability against the towing contractor. This same court, as late as 1970, in *M.P. Howletter, Inc. v. Tug Michael Moran,* adhered to the requirement of negligence in establishing liability for damages occuring to a tow.[34] This author feels that the adoption of the contract approach to maritime service contracts is not in itself undesirable. Unfortunately, the court chose to adopt the *Italia* non-negligence rationale which, considering the policy reasons for *Ryan* and subsequent cases, made sense for indemnity situations in that there was a need, at

31. *See* Stevens v. The White City, 285 U.S. 195 (1932); The John G. Stevens, 170 U.S. 113 (1898). *See generally* 1 E.C. BENEDICT, JURISDICTION & PRINCIPLES § 231 (7th ed. 1974).

32. *See* The Edward G. Murrary, 278 F. 895 (2d Cir. 1922).

33. The John G. Stevens, 170 U.S. 113 (1898). The *John G. Stevens* has never been overruled and must be regarded as good law. GILMORE & BLACK § 9-61.5. *Stevens v. The White City,* 285 U.S. 195 (1932), in dictum reaffirmed the holding in *The John G. Stevens:* "[T]he claim [for damages occasioned by negligent towage], like those in case of collision, is one in tort arising out of duty imposed by law and independently of any contract or consideration for the towage." *See generally* 1 E.C. BENEDICT, JURISDICTION & PRINCIPLES § 231 (7th ed. 1974); 86 C.J.S. *Towage* §§ 34, 38 (1954).

34. 425 F.2d 619 (2d Cir. 1970) (barge was shipping water and tug had to cast off and abandon it to sink). Other courts have continued to adhere to this requirement for negligence. *See, e.g.,* Mid-America Transp. Co. v. National Marine Serv., Inc., 497 F.2d 776 (8th Cir. 1974) (a case strikingly similar to the instant case where a barge went aground while under the tow of a tug); Hart v. Blakemore, 410 F.2d 218 (5th Cir. 1969) (tug beached a house boat which started to sink while in tow); Hournu Well Service, Inc. v. Tug Capt. O'Brien, 312 F. Supp. 257 (E.D. La. 1970) (barge sank while in tug's tow).

least as seen by the courts,[35] to encourage prevention of accidents. While this is a desirable goal for non-indemnity situations, as in the instant case, it would seem that the use of the doctrine of comparative negligence in admiralty would have the same effect, without the additional disadvantage of burdening one of the parties with all the loss. It would have been far better for the court to have followed the rationale in *Ryan* that the existence of breach could turn on the standard of performance[36] and then to have used a standard of reasonableness requiring negligence for a breach to exist.[37]

Cleatous J. Simmons

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35. The Court in *Italia* said:

> We deal here with a suit for indemnification based upon a maritime contract, governed by federal law . . . in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury . . . we think our decision today is in furtherance of those objectives. 376 U.S. at 324.

For an exhaustive treatment of the policy of the cases following *Ryan* see Proudfoot, *"The Tarbaby"; Maritime Personal Injury Indemnity Actions,* 20 STAN. L. REV. 423 (1967-1968). An interesting discussion of policy with regard to "duty" is found in Harvey, *Contracts-Breach of Duty-Liability Respectively of Shipper & Carrier,* 47 CAN. BAR. REV. 299 (1969).

36. *See* text accompanying note 15 *supra.*

37. *See* note 18 *supra.*

ADMIRALTY—FEDERAL COURT HAS ADMIRALTY JURISDICTION OVER AVIATION TORT WHEN FLIGHT SERVED THE PURPOSE OF MARITIME ACTIVITY

On October 21, 1972, an Olympic Airways flight from the Greek island of Corfu to Athens crashed into the Greek territorial waters[1] of Voula Bay while on approach to the Athens airport. One passenger on this flight was Caroline Hammill Cagle, a United States citizen and a resident of Virginia. After her death in the crash, the administrator of the estate sought damages in the United States District Court for the District of Columbia for wrongful death[2] under the general maritime law,[3] along with other theories of recovery.[4] The parties agreed by stipulation that any negligence of defendant's pilot would have taken place somewhere above the Mediterranean Sea, over international waters. Defendant moved to dismiss the complaint for lack of admiralty jurisdiction and for failure to state a claim, arguing that an airplane crash into the sea does not have a sufficient maritime nexus under general maritime law to support admiralty jurisdiction and is not specifically provided for by statute. The District Court *held* motion to dismiss denied. The nature of the flight is determinative, and admiralty jurisdiction is proper when the flight served a purpose that had traditionally been carried on by surface-going maritime vessels. *Hammill*

1. If the crash had occurred more than one marine league (three miles) from shore, the Death on the High Seas Act (DOHSA) would have provided jurisdiction for wrongful death claims. 46 U.S.C. § 761 *et seq.* (1920).

2. Damages for conscious pain and suffering, loss of support on behalf of decedent's niece and two nephews, and punitive damages for the willful misconduct of defendant's pilot were also sought.

3. Jurisdiction over maritime causes of action is provided by 28 U.S.C. § 1333 (1970). In general, advantages of the admiralty forum are the availability of the uniform body of federal maritime law; the possibility of consolidating claims with federal courts having exclusive jurisdiction over the action; and the fact that contributory negligence is not a bar to recovery, but only a mitigating factor. *See* Note, 47 TUL. L. REV. 1143 (1973). Advantages of the admiralty forum are discussed in Moore & Pelaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. AIR L. & COM. 3, 3-4 (1967).

4. Recovery was also sought to be based (1) on the general common law cause of action for wrongful death, (2) the "Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, on Civil Aeronautics Board (CAB) Order No. E-23680 (The "Montreal Agreement"), and obligations undertaken by defendant under the Tariff and Agreement (CAB No. 16712 and Order No. E-24571, approved by CAB on December 29, 1966); (3) a wrongful death claim based on the general common law theory of absolute liability; and (4) a wrongful death claim founded on DOHSA.

v. Olympic Airways, S.A., 398 F. Supp. 829 (D.D.C. 1975).

The Constitution provides that admiralty jurisdiction resides in the federal courts,[5] and powers over maritime law were vested in Congress.[6] The previously existing substantive law in admiralty was governing,[7] but "the precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history."[8] Many are the tests that have been utilized to resolve the puzzling question of jurisdiction. The locality test has traditionally been determinative of admiralty jurisdiction.[9] In 1389 Parliment restricted admiralty jurisdiction to "a thing done upon the sea."[10] As late as 1876, the common law jurisdiction in England was conceived to stop at the low water mark.[11] In the United States, the admiralty and maritime jurisdiction was held in *DeLovio v. Boit* in 1815 to include all maritime contracts, torts, and injuries, with tort jurisdiction bounded by maritime locality.[12] The Supreme Court implemented the locality test in 1866 in *The Plymouth* by

5. U.S. Const. Art. III, § 2.

6. Justice Frankfurter noted in *Romero v. International Terminal Operating Co.* that Article III impliedly (1) granted Congress authority to confer admiralty and maritime jurisdiction on the tribunals inferior to the Supreme Court authorized by Article I, § 8, cl. 9; (2) empowered federal courts to continue development of the admiralty and maritime law within constitutional limits, along with drawing on the substantive law inherent in the admiralty and maritime jurisdiction; and (3) empowered Congress to revise and supplement maritime law within the limits of the Constitution. 358 U.S. 354, 360-61 (1959). Justice Frankfurter noted in *Romero* that this jurisdictional grant has remained unchanged in substance to the present. 358 U.S. at 361. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-9 at 18-19 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

7. "When the Constitution was adopted, the existing maritime law became the law of the United States subject to power in Congress to modify or supplement it as experience or changing conditions might require." Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43 (1934). *See* Crowell v. Benson, 285 U.S. 22, 55 (1932).

8. The Blackheath, 195 U.S. 361, 365 (1904).

9. Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971).

10. Admiralty Jurisdiction Act of 1389, 13 Ric. 2, c. 5. *See* 1 E. SHIRAD & A. SANN, BENEDICT ON ADMIRALTY (Jurisdiction) (7th ed. 1974) § 33, [hereinafter cited as BENEDICT].

11. R. v. Keyn (1876), 2 Ex. D. 63, 46 L.J. (M.C.) 17, 13 Cox CC. 403; 1 BENEDICT, § 141, 9-2.

12. De Lovio v. Boit, 7 F. Cas. 418, (No. 3776) (D. Mass. 1818). Purpose proved determinative in the question of admiralty jurisdiction over contracts. Admiralty jurisdiction extended to all contracts relating to the navigation, business, or commerce of the sea. *See, e.g.*, Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870) (admiralty jurisdiction upheld over contract for insurance of ship); GILMORE & BLACK, § 1-10 at 22.

upholding admiralty jurisdiction for "every species of tort. . . whether on board a vessel or not, if upon the high seas or navigable waters. . . ."[13] Salvage of downed aircraft at sea is allowed under what is essentially a locality test.[14] The locality test has also been followed in some modern admiralty cases.[15] In *Weinstein v. Eastern Airlines* the locality test was used to uphold admiralty jurisdiction in cases arising from the crash of a commercial jet into Boston Harbor while enroute from Boston to Philadelphia.[16] But the locality test often led to curious results. A longshoreman knocked from the pier into the water was held to be outside admiralty jurisdiction,[17] but a longshoreman knocked from the deck of a vessel onto the pier was held to be within the admiralty jurisdiction.[18] Swimmers have been held entitled to invoke the admiralty jurisdiction.[19] Difficulties and confusion with the locality test[20] led to use of the

13. The Plymouth, 70 U.S. (3 Wall.) 20, 35, 36 (1866), (wharf set afire by sparks from burning ship, admiralty jurisdiction upheld).

14. H. HOTCHKISS, A TREATISE ON AVIATION LAW, 88 (2d ed., 1938); Lambros Seaplane Base v. The Batory, 215 F.2d 228 (2d Cir. 1954); GILMORE & BLACK, § 8-3 at 540.

15. For modern cases using the locality test *see, e.g.*, United States v. Matson Nav. Co., 201 F.2d 610, 613 (9th Cir. 1953) (admiralty action for damage to dike in navigable river); London Guar. & Accident Co. v. Indus. Accident Comm., 279 U.S. 109, 123-24 (1929) (drowning in navigable, territorial waters of a state). *See* 1 BENEDICT, § 141 at 9-5.

16. 316 F.2d 758, 761 (3d Cir. 1963). For a scathing criticism of the use of the locality test for admiralty jurisdiction over air crashes, *see* GILMORE & BLACK, § 1-10 at 30-31.

17. Smith & Son v. Taylor, 276 U.S. 179 (1928). *But see* Interlake S.S. Co. v. Nielsen, 338 F.2d 879, 882-83 (6th Cir. 1964) (admiralty jurisdiction upheld where car driven off dock into Lake Erie, impetus of accident termed "land-based").

18. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935).

19. Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (injury to swimmer by surfboard).

20. In *De Lovio v. Boit*, Justice Story said the locality-based jurisdiction restrictions on the British Admiralty Court were not applicable to the colonies, and that admiralty should encompass matters pertaining to the sea, not merely things happening on the sea. 7 F. Cas. at 442. *See* GILMORE & BLACK, § 1-9 at 21. Countless commentators have criticized the strict locality test. *See, e.g.*, 7A J. MOORE, FEDERAL PRACTICE ¶ .325[3], ¶ .325[5] (1972); Black, *Admiralty Jurisdiction; Critique and Suggestions*, 50 COLUM. L. REV. 259, 264 (1950); Ingold, *Torts Along the Water's Edge: Admiralty or Land Jurisdiction?*, 1968 U. ILL. L.F. 95 (1968); Comment, 64 COLUM. L. REV. 1084 (1964).

The rigid locality test was weakened by extension of admiralty jurisdiction to land used in aid of navigation in *The Blackheath*, 195 U.S. 361 (1904) (ship collision with lighthouse). For other erosions of the locality test, *see, e.g.*, The Gilbert Knapp, 37 F. 209 (E.D. Wis. 1889) (stevedore's contract claim within

impact test, which held that torts occur not at their inception but at the impact which gives rise to the cause of action.[21] The determination of admiralty jurisdiction had occasionally been based on maritime function or purpose,[21] and in 1914 in *Atlantic Transport Company of West Virginia v. Imbrovek* the Supreme Court verged on requiring a sufficient relation to maritime function for admiralty jurisdiction.[23] Sufficient relation of the tort to maritime service became a requirement (along with the locality requirement) in the locality plus test. This test was used in *Chapman v. City of Grosse Pointe Farms* to deny admiralty jurisdiction in the case of a car driven from a pier into eighteen inches of water.[24] Finally, in *Peytavin v. Government Employees Ins. Co.*, the Fifth Circuit

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admiralty jurisdiction); Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 24 (1871) (jurisdiction over marine insurance policy).

The Admiralty Extension Act of 1948, 46 U.S.C. § 740 (1970), provides jurisdiction for any damage caused by a vessel, whether on sea or land. This also provided admiralty jurisdiction for torts committed by the shipowner during or before unloading of the vessel where the impact was ashore at a time and place not remote from the wrongful act. *See* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 210 (1963) (injury caused by beans on dock, spilled during unloading). *See* GILMORE & BLACK, § 1-10 at 23, n. 75; 338 F.2d at 882. Similarly, seamen are entilted to maintenance and cure for injuries received in service of the vessel—whether on sea or land. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42 (1943).

21. Cases which employed the impact test to air crashes include Lavello v. Danko, 175 F. Supp. 92 (S.D.N.Y. 1959); and Wilson v. Transocean Airlines, Inc., 121 F. Supp. 85, 92 (N.D. Cal. 1954). *See* 47 TUL. L. REV. 1143, 1144 (1973); 26 ARK. L. REV. 390, 394 (1972); Dunn v. Wheeler Shipbuilding Corp., 86 F. Supp. 659, 660 (E.D. N.Y. 1949) (vessel manufacturing defects not operative for statute of limitations purposes until time of capsizing). *See also* Gray v. American Radiator Co., 22 Ill. 2d. 432, 176 N.E.2d 761 (1961); M. GREEN, BASIC CIVIL PROCEDURE, § 4, at 33 (1972).

22. In *The Robert W. Parsons*, the Supreme Court held "neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged." 191 U.S. 17, 30 (1903). For further discussion *see* Cope v. Vallette Dry Dock Co., 119 U.S. 625, 629 (1887); Campbell v. H. Hackfeld & Co., 125 F. 696 (9th Cir. 1903); Comment, 6 VAND. J. TRANSNAT'L L. 649, 651 (1973); E. BENEDICT, THE AMERICAN ADMIRALTY 173 (1850); 1 BENEDICT § 165, 10-10.

23. Justice Hughes wrote, "*If* more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient." 234 U.S. 52, 62 (1914) (emphasis mine).

24. 385 F.2d 962, 963 (6th Cir. 1967). Swaim, *The Fifth Circuit 'Returned to Navigation'*, 19 LOYOLA L. REV. 617 (1973); Executive Jet, 409 U.S. 251.

abandoned the locality requirement altogether in the substantial connection test.[25] In 1972 the Supreme Court finally tried to resolve the jurisdictional questions that had lingered since *Imbrovek*.[26] In *Executive Jet*, the aircraft ingested seagulls on takeoff for a land-based flight from Cleveland, Ohio to Portland, Maine. The jet crashed within a fifth of a statute mile offshore.[27] The *Executive Jet* Court held that "fortuitous" maritime locality should not alone be determinative of admiralty jurisdiction,[28] and refused jurisdic-

25. 453 F.2d 1121 (5th Cir. 1972). Factors to be *considered* for substantial connection to maritime activities or interests include: (1) activities of the parties at the time of the accident; (2) the relationship between the parties; (3) the location where the injuries were sustained, and (4) the nature of the damage sustained. 453 F.2d at 1127. "In other words, Judge Gewin retained the 'plus' but abandoned the 'locality' of the locality plus test." Discussed by Swaim, *supra* note 24 at 618-19.

Surprisingly enough, a similar test for admiralty jurisdiction had been used in England as early as 1892. The Queen v. The Judge of the City of London Court, [1892] 1 Q.B. 273. This decision held that all events on the high seas were not within admiralty jurisdiction, and that the locality, the subject matter of the complaint, and the person with whom the complaint was made should all be considered. By this test, there would have been no admiralty jurisdiction if any of these factors were missing. 1 Q.B. at 294-95. *See also* Campbell v. H. Hackfeld & Co., 125 F. 696 (9th Cir. 1903); 13 COLUM. J. TRANSNAT'L L. 340, 344 (1974). One commentator had accordingly advocated the same jurisdictional test for both maritime torts and contracts. Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 DUQUESNE L. REV. 1, 43 (1968).

26. Executive Jet, 409 U.S. 249, 258. *See* Comment, 14 VA. J. INT'L L. 171, 176 (1973); 234 U.S. at 61, note 23, *supra*.

27. 409 U.S. 249. In *Executive Jet* the Supreme Court refused admiralty jurisdiction in the case of a jet crash on a flight from Cleveland, Ohio, to Portland, Maine. The *Executive Jet* Court, however, refrained from deciding whether an aviation tort could ever have sufficient nexus with traditional maritime activity for admiralty jurisdiction. "It could be argued, for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute. An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels. . . ." 409 U.S. at 271.

28. 409 U.S. at 261. Disclaiming the strict locality test, the *Executive Jet* Court noted, "The federal courts should not be burdened with every case of an injured swimmer." *Id.*, at 258. *See also* 1969 AMERICAN LAW INSTITUTE STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 233. *But see Davis v. City of Jacksonville Beach*, note 19 *supra*. It is, of course, arguable that the locality of the tort in *Executive Jet* was not really in Lake Erie. *But see* discussion of the impact test for tort locality, text following note 19 *supra*; Comment, 26 ARK. L. REV. 390, 394 (1972). The *Executive Jet* rejection of the mechanical locality test has been explained as based on the difficulties attributable to the

tion over the crash because there was no significant relationship between the land-based flight and traditional maritime activity.[29] A two-step requirement of both maritime locality and maritime nexus became the test for admiralty jurisdiction.[30] The *Executive Jet* holding was conservative and seemed to narrow admiralty jurisdiction.[31] The *Executive Jet* decision has since been cited as black letter law in determining admiralty jurisdiction.[32] Furthermore, the *Executive Jet* locality plus test has been used to make difficult and precise distinctions of admiralty jurisdiction.[33] But

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inherent nature of aircraft; the inconsistency of the aviation industry's problems with the history and purpose of admiralty; and the frustrating possibility that two planes might collide in mid-air, with one falling in water and the other on land. Comment, 14 VA. J. INT'L L. at 176.

29. 409 U.S. at 272-73. Authorities favoring such denial of jurisdiction include 7A J. MOORE, FEDERAL PRACTICE, Admiralty ¶¶ .325[3], .325[5] (2d ed. 1972); C. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 264 (1950); Richards, *Maritime Liens in Tort, General Average and Salvage*, 47 TUL. L. REV. 569, 571 (1973). *See also* Chapman v. City of Grosse Pointe Farms, note 24, *supra*.

30. "It is far more consistent with the history and purpose of admiralty to require *also* that the wrong [in the maritime locality] bear a significant relationship to traditional maritime activity." 409 U.S. at 268 (emphasis added).

31. *See* Comment, 14 VA. J. INT'L L. 171, 176 (1973); Victory Carriers v. Law, 404 U.S. 202. Gilmore and Black state that *Executive Jet* overruled "to some not yet certain extent" the cases giving jurisdiction over aircrashes into water. GILMORE & BLACK, 31. The *Executive Jet* holding itself was phrased only in terms of "claims arising from airplane accidents." 409 U.S. at 268. The *Executive Jet* test has, of course, been applied to a variety of claims. *See* note 34, *infra*.

32. *See, e.g., Onley v. South Carolina Elec. & Gas Co.*, 488 F.2d 758, 759 (4th Cir. 1973); Rubin v. Power Authority of State of New York, 356 F. Supp. 1169 (W.D.N.Y. 1973). In *Onley*, the plaintiff dove from a dock into Lake Murray, South Carolina, and was injured when he struck a submerged boat ramp. Defendant controlled the lakes's water level in connection with its generation of electric power. The maritime nexus requirement was held unsatisfied. 488 F.2d at 759. In *Rubin*, divers in the Niagra River for recreation and possible salvage were drowned when they were drawn into the intakes of defendant's generating plant. This, too, was held to constitute an insufficient maritime nexus. 356 F. Supp. at 1170. *See also* Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973) (suit by water skier not properly in admiralty).

33. In *Oppen v. Aetna Insurance Co.*, the *Executive Jet* decision was applied to sustain a cause of action in maritime tort for a vessel's damages from contact with an oil slick, while denying admiralty jurisdiction over plaintiff's loss of navigation rights in the same incident. 485 F.2d 252, 253, 257 (9th Cir. 1973).

In 1974 the Fifth Circuit was confronted by a case involving explosion and fire on an offshore oil platform which extended to a vessel moored to the platform. *In re* Dearborn Marine Serv., Inc., 499 F.2d 263 (5th Cir. 1974). This disaster case included suits on behalf of the platform operator's deceased supervisor against the

application of the *Executive Jet* rule led to results of questionable consistency,[34] and the admiralty jurisdiction was characterized as being in a state of "uncertainty."[35] The *Executive Jet* holding has been criticized for not presenting specific criteria for the "significant relationship to traditional maritime activities,"[36] and proper

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platform owner and platform operator for violation of safety regulations, along with suits against the vessel owner for negligence and unseaworthiness. *Id.*, at 269. The *Dearborn* court used a locality plus maritime nexus analysis to sustain admiralty jurisdiction over the platform defendants. *Id.*, at 276. The court held the only maritime nexus as to the platform defendants was the deceased's presence on the vessel. The admiralty interest was said to intervene in the action against the vessel defendants, however, "because the risks to which Monk [the deceased] was exposed by [vessel defendant] Dearborn, and Dearborn's breaches thereof, were admiralty-related, concerning the duty of the vessel to those aboard her." *See* Compagnie General Transatlantique, 358 U.S. 625 (1959).

The *Executive Jet* locality plus test has also been used to sustain admiralty jurisdiction over the damage claim that resulted after a ship was struck by a sidewinder missile released by a crashing United States Navy jet. T.J. Falgout Boats Inc. v. United States, 508 F.2d 855 (9th Cir. 1974). The ship was in navigable waters when it was struck by the missile. The court noted the U.S. Navy exists for the purpose of operating vessels in, on, and over navigable waters. Similarly, the Court found that Navy aircraft, *whether land-based or sea-based*, function in nautical operations. The court also found that the sidewinder missile created a potential navigation hazard. *Id.*, at 857.

The locality plus test was used to uphold admiralty jurisdiction over a pulp and paper mill whose smoke caused a vessel to collide with a barge spanning the Savannah River. *In re* Motor Ship Pacific Carrier, 489 F.2d 152, 153 (5th Cir. 1974) (smoke interfering unreasonably with the vessel's use of the waterway). Locality plus has also been used to deny jurisdiction over a land-based helicopter flight after refueling from an air-sea rescue. Teachey v. United States, 363 F. Supp. 1197, 1198-99 (M.D. Fla. 1973).

34. *See* Comment, 4 GA. J. INT'L & COMP. L. 232, 237 (1974). In *Adams v. Montana Power Co.*, 354 F. Supp. 1111 (D. Mon. 1973), the traditional maritime activity nexus was found lacking in a boating accident on navigable river waters between two dams. This was "locality plus" with a vengeance. *But*, in *Luna v. Star of India*, 356 F. Supp. 59 (S.D. Cal. 1973), admiralty jurisdiction was allowed in an action for injury aboard a restored merchant vessel. The Star of India was essentially a floating museum in North San Diego Bay, not having seen actual maritime use since 1923. In *Carroll v. Protection Maritime Insurance Co., Ltd.*, the maritime nexus test was even employed to sustain admiralty jurisdiction over an alleged conspiracy in restraint of trade. Seamen and commercial fishermen who had previously brought personal injury actions against their employers claimed loss of work due to "listing" by the insurance carrier defendants. 512 F.2d 4 (1st Cir. 1975).

35. Comment, 4 GA. J. INT'L & COMP. L., at 237.

36. Neal & Connolly, *Admiralty Jurisdiction: Executive Jet in Historical Perspective*, 34 OHIO STATE L. J. 355, 369 (1973).

interpretation of *Executive Jet* has indeed proved difficult. As Circuit Judge Morgan noted in dissent in *Kelly v. Smith*, "Everyone agrees that 'locality plus' is the test in this case but we are still faced with the question, 'locality plus what'?"[37] The Fifth Circuit had attempted to answer that question in the *Kelly* case, which involved injuries that resulted when hunters fired on poachers who were fleeing by outboard on the Mississippi River.[38] The court held that factors for consideration in determining admiralty jurisdiction include: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law.[39] Morgan advocated analysis of the conflicting interests of state and federal law as another criterion.[40] *Kelly v. Smith* has, however, been sharply criticized as a return to the strict locality test.[41] Still other tests for admiralty

37. 485 F.2d 520, 527 (1973). Proper interpretation of *Executive Jet* has been termed the "thorniest problem" faced by the Fifth Circuit in 1973. Chamlee, *Admiralty*, 25 MERCER L. REV. 787, 790.

38. 485 F.2d at 521.

39. 485 F.2d at 525. The analysis of *Kelly* has aided other determinations of admiralty jurisdiction. *See In re* Silver Bridge Disaster Litigation, 381 F. Supp. 931, 943 (S.D.W. Va. 1974) (no admiralty jurisdiction over collapse of highway bridge onto Ohio River); St. Hilaire Moye v. Henderson, 496 F.2d 973, 978-79 (8th Cir. 1974) (admiralty jurisdiction over accident involving *pleasure* craft in navigable waters); Neal & Connolly, *supra* note 36, at 371, 372.

40. 485 F.2d at 526 *et seq.* This evaluative weighing of state and federal interests is discussed in Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 702 (1963).

National interests include the need for a uniform system to foster maritime commerce by precluding local discriminatory practices and providing a single system of law upon which foreign traders can rely. *See* Southern Pac. v. Jensen, 244 U.S. 205 (1917). The national interest also includes resolving disputes in admiralty beyond state boundaries.

State interests include the state's desire to apply local law to controversies within the state's boundaries and to controversies involving the state's citizens. *See* Victory Carriers v. Law, 404 U.S. 202 (1971). Despite federal supremacy in admiralty, the prevalent attitude of "scrupulous confining" of the federal jurisdiction makes such a balancing of state and federal interests possible. *See* Executive Jet, 409 U.S. at 272-73; Healy v. Ratta, 292 U.S. 263, 270 (1934); 404 U.S. at 212; Neal & Connolly, *supra* note 36, at 374; Chamlee, *supra* note 37, at 933.

41. Swaim, *supra* note 24, at 636 (1973). Swaim views the *Executive Jet* Court as misunderstanding and corrupting the *Peytavin* substantial connection test, which requires no maritime locality for admiralty jurisdiction. *Id.*, at 620, note 18. *Kelly's* "locality test" is therefore a corruption of *Executive Jet* and a further perversion of *Peytavin*. *Id.*, at 638.

jurisdiction have been suggested.[42] Jurisdictional decisions over aviation torts have been particularly divergent. Admiralty jurisdiction was upheld over the mid-air collision of two planes being used to spot schools of fish in the Gulf of Mexico in *Hornsby v. Fish Meal Co.*,[43] but in early 1975 in *American Home Assurance Co. v. United States* the Middle District of Pennsylvania *denied* admiralty jurisdiction over the crash of an aircraft en route from Atlantic City, New Jersey to Block Island, New York.[44] The need for further clarification of the scope of admiralty jurisdiction was obvious.

The uncertainty that followed *Executive Jet* was faced by the court in the instant case. The court noted that the Supreme Court in *Executive Jet* expressly avoided deciding whether aviation torts could ever satisfy the nexus test for traditional maritime activity.[45] "The issue left open by the Supreme Court in *Executive Jet* is thus

42. Stolz, *supra* note 40, at 661. Stolz finds admiralty jurisdiction to be based on connection with commercial activity, with the commercial connection determinative of the federal-state interest inquiry. Stolz, *supra* note 40, at 661. "Certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade." The Genessee Chief, 53 U.S. (12 How.) 443, 457 (1852) ("upholding" the Great Lakes Act of 1845, 5 Stat. 726). *See* The Mamie, 5 F. 813, 819 (E.D. Mich. 1881). For further support, Stolz notes that there apparently is no imputed negligence rule in admiralty, which "is scarcely surprising, for the 'family purpose' doctrine is meaningless in a commercial context." Stolz, *supra* note 40, at 717. "The Supreme Court has occasionally flirted with the notion that the proper ambit of admiralty law is circumscribed by what is of concern to commerce." *Id.* at 665. *See* The Lottawanna, 88 U.S. (21 Wall.) 558 (1874); Imbrovek, 234 U.S. 52. *But see* St. Hilaire Moye v. Henderson, 496 F.2d at 978-79. In any event, Stolz notes, "where the needs of commerce cease, the need for applying federal law ought also to end." Stolz, *supra* note 40.

Benedict, on the other hand, calls for a "significant relationship to shipping and navigation" for admiralty jurisdiction in the "secondary locale" of inland navigable waters, while requiring no more than maritime locality in the "primary locale" of the high seas. 1 BENEDICT § 141, 9-5.

43. 431 F.2d 865 (5th Cir. 1970). One plane crashed within a maritime league of the Louisiana shore. But admiralty jurisdiction was upheld because the aircraft was enacting a function traditionally performed by waterborne vessels. Hornsby v. Fish Meal Co., 431 F.2d at 866. *See* Executive Jet, 409 U.S. at 271. Admiralty jurisdiction was also upheld over the crash in navigable waters of a cargo plane bound from Los Angeles to Okinawa in *Roberts v. United States*, 498 F.2d 520, 526 (9th Cir. 1974) (crash 1,500-1,900 feet shy of the runway, outside the coverage of DOHSA).

44. 389 F. Supp. 657 (M.D. Pa. 1975). *See* note 52 *infra*.

45. 398 F. Supp. at 832-33. *See* 409 U.S. at 271.

squarely before this court."[46] The Court, however, had already cited *Executive Jet* to discard the locality test, holding the parties' stipulation of locality insufficient to establish admiralty jurisdiction. The court found "implicit approval" by the *Executive Jet* Court for aviation personal injury suits in admiralty under the Death on the High Seas Act (DOSHA), even though such a remedy is not provided by DOSHA or other statutes. The district court found language in *Executive Jet* concerning possible admiralty jurisdiction over a trans-Atlantic flight "helpful," but not "dispositive."[47] The court then upheld admiralty jurisdiction in the instant case, relying on a *purpose determinative* test drawn from language in *Executive Jet*: "What is central to this question, under *Executive Jet*, is not the situs of the crash, but rather the nature of the flight itself . . . [This flight] was serving a function that had traditionally been carried on by surface-going maritime vessels."[48] The fact that defendant's jet crashed into Greek domestic waters during what was essentially a Greek domestic flight was held not to upset the admiralty jurisdiction.[49] The court noted in support of this finding that "the uniform applicability of the rules of admiralty in various jurisdictions is the foundation of their usefulness."[50]

46. 398 F. Supp. at 833.

47. 398 F. Supp. at 834.

48. 398 F. Supp. at 834. A similar purpose determinative test was used in *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970) (aircraft re-enacting function traditionally performed by waterborne vessels). *See also* The General Cass, 1 Brown Adm. 334, 10 F. Cas. (No. 5), 307: "the true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion." *See* 1 BENEDICT, § 164, and the list at 10-11 through 10-16 of over fifty various instrumentalities and vehicles which have qualified in admiralty jurisdiction. *But see* American Home Assurance Co. v. United States, 389 F. Supp. 657, 658 (M.D. Pa. 1975) (no admiralty jurisdiction over flight to Block Island).

49. 398 F. Supp. at 834. The court seems to be minimizing the jurisdictional importance of locality. *See* note 25 *supra*; Peytavin, 453 F.2d 1121; Carroll v. Protection Marit. Ins. Co., 512 F.2d 4, 5 (1975). Judge Richey noted, "The defendant's jetliner in the instant case was engaged in what may be viewed as a Greek domestic flight, although the flight occurred almost entirely over international waters. Even so, this consideration has little relevance to the question of whether an action for the wrongful death of an American citizen resulting from the crash of such an aircraft can be said to be within the maritime jurisdiction of a United States federal court." 398 F. Supp. at 834.

50. 398 F. Supp. at 834, n.6. Judge Richey also points out that litigants would

The *Executive Jet* holding posed the question whether an aviation tort can *ever* satisfy the maritime nexus requirement.[51] Commentators and courts have tried to face this hypothetical of admiralty jurisdiction, with varying conclusions. Holdings consistent with the purpose determinative language of *Hammill* had been rendered in *Hornsby v. Fish Meal Co.* and *Roberts v. United States*.[52] But the denial of admiralty jurisdiction in *American Home Assurance*[53] was a direct contradiction of the purpose determinative test in a jurisdictional setting virtually identical to *Hammill*.[54] It is time for the Supreme Court to once again answer its own question, and clarify the proper scope of admiralty jurisdiction in cases of aviation tort. For now, however, the "state of uncertainty" persists for the applicability of admiralty jurisdiction to maritime torts. Commentators have distinguished ships from air-

face choice-of-law, choice-of-forum, and other problems if there were no uniform applicability of the rules of admiralty. *See* Executive Jet, 409 U.S. at 506; note 26 *supra*. Commentators have noted that remedies and protections should be the same on both intra- and inter-continental flights. Comment, 4 J. MARIT. L. & COM. 637 (1973); 6 VAND. J. TRANSNAT'L L. 649, 658-59 (1973).

51. 409 U.S. at 271.

52. "Geographic realities, therefore, do not make the cargo plane's contact with navigable waters entirely 'fortuitious.' More significantly, the transoceanic transportation of cargo is an activity which is readily analogized with 'traditional maritime activity.' Indeed, before the advent of aviation, such shipping could only be performed by waterborne vessels." Roberts v. United States, 498 F.2d at 524. *See also* T. J. Falgout Boats, Inc. v. United States, 508 F.2d at 857, and note 33 *supra* (purpose determinative language applied to navy jets and missiles); Hark v. Antilles Airboats, Inc., 355 F. Supp. at 687 (seaplane found to have taken over function of waterborne vessels in transit between St. Thomas and St. Croix).

53. *But see* Hark v. Antilles Airboats, Inc., note 52 *supra*. In *American Home Assurance*, the District Court held: "The drift of the *Executive Jet* opinion is that the Supreme Court has serious doubts as to whether airplane accidents are proper subjects of admiralty suits. Thus, the Court does not feel that the fact that Block Island was separated from the mainland is sufficient alone to distinguish this case from *Executive Jet*. . . ." 389 F. Supp. at 658. *See also* Comment, 4 GA. J. INT'L & COMP. L. at 236, "This [the *Executive Jet* hypothetical] then raises the problem of what constitutes a significant relationship to traditional maritime activity where aviation is concerned. The Court seems to be saying that there is none." *See* 7A J. Moore, FEDERAL PRACTICE, ¶ 30[5] at 3771-72.

In *American Home Assurance* the flight seems to have been exclusively over domestic waters, and this might allow *Hammill* to be distinguished. But the uniform applicability of admiralty jurisdiction in *Hammill* was not disturbed by the domestic waters locality of the crash. 398 F. Supp. at 834. *See* note 50 *supra*. *Hammill* and *American Home Assurance* are in direct contradiction, especially in view of *Hammill's* policy of uniform applicability of admiralty.

54. 389 F. Supp. at 658. The island was only accessible by air or by sea.

planes with exasperation,[55] foretelling the dangers of applying admiralty jurisdiction to aviation torts. The commentators were seemingly joined by the Supreme Court itself in calling for a Congressional answer to the riddle of *Executive Jet*.[56] Such legislation could obviously be the most precise, definite, and comprehensive solution to the problem. But in the absence of legislation, admiralty jurisdiction *should* include aviation torts that qualify under the purpose determinative test. Denial of jurisdiction merely because *air* travel is involved seems a bizarre step to the past and the locality test. Case law interpretations of DOSHA provide an analogy in support of inclusion of aviation torts in admiralty jurisdiction.[57] In *D'Aleman v. Pan American World Airways* the Second Circuit held:

> The statutory expression 'on the high seas' should be capable of

55. "Ships, by their very nature, are relegated solely to the seas and to the great inland lakes and waterways of the world. The shores of these waters form boundaries, beyond which they cannot operate. Airplanes, on the other hand, are not limited by any such physical boundaries and can and do operate over both land and navigable bodies of water. Thus application of a system of laws geared only to commerce and navigation upon navigable waters will of necessity cause meaningless distinctions if applied to aircraft unhindered by such geographical boundaries." 7A J. MOORE, FEDERAL PRACTICE ¶ 30[5] at 3771-72. *See* Executive Jet, 409 U.S. at 266. The *Executive Jet* Court noted that in contexts besides tort, the Congress and courts have exempted aircraft from the maritime law because of the uniqueness of air travel. 409 U.S. at 269-70; the Federal Aviation Act of 1958, 49 U.S.C. § 1509(a) (1970), successor to the Air Commerce Act of 1926, 44 Stat. 572. *See* note 56 *infra*. *See also* 34 OHIO STATE L. REV. at 371.

56. "If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce." Executive Jet, 409 U.S. at 274. This "invitation" has been termed "appropriate." 6 VAND. J. TRANSNAT'L L. at 659. The commentators have likewise urged uniform legal protection for both intra- and inter-continental aviation torts. Comment, 4 J. MARIT. L. & COM. at 643; Comment, 6 VAND. J. TRANSANT'L L. at 658, 659. Similarly, Moore advocates that "just as the admiralty has, from ancient times, been found in need of special legal principles and procedures especially suited to its peculiarities, so too should air commerce be guided by a set of rules and principles especially adapted to the specific problems it creates." 7A J. Moore, at 3775-76. *See* Comment, 14 VA. J. INT'L L. at 175; Sweeney, *Is Special Aviation Liability Legislation Essential?* 19 J. AIR L. & COM. 166 (1952); Comment, 55 COLUM. L. REV. 907, 922 (1955); 4 J. MARIT. L. & COM. at 644.

57. *See* 316 F.2d at 763. DOHSA was first passed in 1920, when the only feasible way to go "beyond a marine league from shore" and qualify for DOHSA jurisdiction was by ship.

> expansion to, under, or over, as scientific advances change the methods of travel. The law would indeed be static if a passenger on a ship were protected by the Act and another passenger in the identical location three thousand feet above in a plane were not.[58]

The *D'Aleman* reasoning has accordingly been used to uphold admiralty jurisdiction for a trans-Atlantic air tort involving no contact with the water.[59] Furthermore, federal courts have extended beyond DOSHA to grant admiralty jurisdiction over personal injury actions arising from aircraft accidents over the high seas in crashes over one marine league from shore.[60] The *Hammill*

58. 259 F.2d 493, 495 (2d Cir. 1958). This equating of voyagers on and above the ocean is within the ambit of *Hammill's* purpose determinative test. The Southern District of New York held, "The statute certainly includes the phrase 'on the high seas' but there is no reason why this should make the law operable only on a horizontal plane. The very next phrase 'beyond a marine league from the shore of any state' may be said to include a vertical sense and another dimension." Choy v. Pan American World Airways, 1941 A.M.C. 483, 484 (S.D.N.Y.). *See* Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874, 875-76 (W.D. Pa. 1965).

Indeed, during aviation's developing years in the United States, "There was a considerable body of opinion that the entire ocean of air surrounding the earth is within the admiralty and maritime jurisdiction of the federal government." Wilson v. Transocean Airlines, 121 F. Supp. 85, 91, note 23 (N.D. Cal. 1954). This approach is also supported by the common law property doctrine of *Cujus Est Solum Ejus Est Usque Ad Coelum*, which holds that exclusive rights are maintained infinitely upward. 244 F. Supp. at 876. *But see* City of Newark v. Eastern Air Lines, 159 F. Supp. 750 (D.N.J. 1958). *Cujus Est* has not been applied in modern times concerning *land* rights, but the nature and needs of civilization on land can distinguish this land practice from the high seas.

59. Notarian v. Trans World Airlines, 244 F. Supp. at 874-75. In *Notarian*, a passenger was injured when the plane jolted violently while traversing the Atlantic Ocean on a flight from Pittsburg to Rome with a New York stopover. *See* Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120 (S.D. Fla. 1966).

Crimes committed on aircraft flying over international waters were originally not punishable under criminal statutes proscribing acts committed on the high seas. *See* United States v. Peoples, 50 F. Supp. 462 (N.D. Cal. 1943); United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950). This policy was changed by Congress to include crimes on aircraft in flight over the high seas or other waters in the admiralty jurisdiction of the United States, excluding waters in any state's jurisdiction. 18 U.S.C. § 7(5) (1970). *See* Executive Jet, 409 U.S., at 262. *See also* note 40 *supra*.

60. *See* Executive Jet, 409 U.S. at 264; Bergeron v. Aero Associates, Inc., 213 F. Supp. 936 (E.D. La. 1963); 244 F. Supp. 874; Horton, 257 F. Supp. 120. Obviously, DOHSA technically would not cover such claims. *See also* Weinstein v. Eastern Airlines, 316 F.2d 765. The *Weinstein* Court noted that to deny admiralty jurisdiction over an air crash just *within* the one marine league of shore

purpose determinative test gains strong support from the broad applicability of the admiralty forum through DOSHA. Furthermore, the differences between nautical and aviation torts for purposes of litigation have probably been exaggerated.[61] In sustaining admiralty jurisdiction in *Hark v. Antilles Airboats, Inc.*, the court based its holding in part on the fundamental similarities between aircraft accidents and marine accidents.[62] Admiralty jurisdiction has a history of broad and, ideally, uniform application in the United States.[63] If the admiralty is to remain a viable body of law,

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"would be to impose an illogical and irrational distinction on the operation of the broad grant of admiralty jurisdiction extended by the Constitution and implemented by 28 U.S.C.A. § 1333." Although *Weinstein* upheld the locality test, its argument for broad applicability of admiralty jurisdiction (especially on both sides of the one marine league from shore line) was quite proper.

61. *See* notes 55 and 56 *supra*.

62. 355 F. Supp. at 686-87. *Hark* involved the crash of a seaplane during flight from St. Thomas Island to St. Croix Island in the Virgin Islands. Although the flight itself was not international, the plane flew over international high seas.

The court called for treating aircraft and marine accidents similarly because both aviation and marine law deal with complex mechanisms. It noted that "airworthiness" and "seaworthiness" are not dissimilar, and that there is a certain kinship between admiralty's Rules of the Road and the aviation doctrine of last clear chance. The court decided that as a matter of policy, aviation torts should not be confined by a brief and unyielding statute of limitations, greater flexibility is needed because both aviation and maritime accidents are more complicated than ordinary torts, typically requiring lengthy official inquiry. 355 F. Supp. at 687.

The court also focused on the convenience of applying the uniform admiralty laws to a tort occurring beyond the territorial jurisdiction of the Virgin Islands. 355 F. Supp. at 687. *See* note 25 *supra*. An additional basis was the peculiarly and necessarily maritime nature of a seaplane at takeoff and landing. 355 F. Supp. at 686.

63. As noted by Circuit Justice Story, "At all events, there is no solid reason for constituting the terms of the Constitution in a narrow and limited sense, or for ingrafting upon them the restriction of English Statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the United States, from uniformity of rules and decisions in all maritime questions, authorizes us to believe that national policy, as well as juridical logic, require the clause of the Constitution to be so construed, as to embrace all maritime contracts, torts and injuries. . . ." De Lovio v. Boit, 7 F. Cas. 418, 443 (No. 3775) (D. Mass. 1815). *See also* The Sea Gull, 21 F. Cas. 909 (No. 12,578) (C.C.D. Md. 1865): "Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules," quoted in Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 583 (1974).

it must adapt to the innovations and evolutions of transportation.[64] This adaptiveness bodes well for the purpose determinative test.

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64. "In facing these and other new problems, the [Admiralty] Court will apply a Law which, however ancient, has demonstrated its flexibility and adaptability to change. . . ." F. WISWALL, THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800, 154 (1970). Wiswall considers the accommodation by Great Britain's admiralty laws to aircraft and hovercraft. Similarly, the Supreme Court noted, "These [maritime concerns] may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters." Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 52 (1934).

ADMIRALTY—MASTER OF A VESSEL HAS A DUTY TO SEARCH AND ATTEMPT A RESCUE WHEN HE KNOWS OR IN THE EXERCISE OF REASONABLE CARE SHOULD HAVE KNOWN A SEAMAN IS MISSING

Plaintiff administratrix brought this action against defendant shipowner to recover for a seaman's wrongful death.[1] The seaman, Joseph Abbott, had been chief engineer on a vessel owned by defendant and had been summoned to the engine room to repair machinery. Decedent never appeared in the engine room, and no immediate attempt was made to determine his whereabouts.[2] Some three hours later, decedent's absence was noted, and the master ordered a search of the vessel. When the search proved unsuccessful, the master commenced rescue efforts on the assumption that decedent had fallen overboard.[3] Decedent was never found and was presumed drowned. Plaintiff alleged that the master was negligent in failing to note decedent's absence and to institute timely rescue efforts.[4] Defendant did not dispute the facts as

1. United States Lines was the owner and operator of the ship *Pioneer Contender* on which decedent seaman served as chief engineer. Suit was brought under the Jones Act, 46 U.S.C. § 688 (1970) and the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1970), both of which require proof of negligence. The provisions of the Death on the High Seas Act do not differ significantly from those of the Jones Act as applied to the issues in the instant case. *See* M. NORRIS, THE LAW OF SEAMEN § 654 (1970) [hereinafter cited as NORRIS]. For the applicable provisions of the Jones Act see note 7 *infra*.

2. The ship was cruising on the high seas when, at approximately 5:00 a.m., a broken pump caused the engines to be shut down. The officer on duty in the engine room notified Abbott, the master, and the first assistant engineer of the problem. Abbott was asleep in his cabin at the time, but when awakened by the messenger, Abbott indicated he would go down to the engine room. Within ten minutes, the first assistant engineer reached the engine room and repaired the pump, whereupon the engines were restarted. Abbott v. United States Lines, 512 F.2d 118, 119 (4th Cir. 1975).

3. When Abbott did not appear for breakfast at approximately 8:00 a.m., the master ordered a search of the ship. The search having proven unsuccessful, at 8:30 a.m., the master broadcast a "man overboard" message, posted lookouts, and sailed the vessel back along its track to its approximate position at 5:00 a.m. Abbott was not found. At 1:00 p.m. the vessel gave up the search and continued the voyage.

4. Plaintiff, Mrs. Abbott, presented testimony to the effect that Abbott's failure to appear in the engine room after having been notified of the trouble was sufficiently remarkable that the master was negligent for not having made an immediate effort to locate him. She presented further testimony tending to show that Abbott's chances of survival would have been significantly increased had search and rescue efforts begun shortly after 5:00 a.m. Defendant did not dispute the facts as presented by plaintiff, but did present evidence which indicated that

presented by plaintiff, but denied negligence. The United States District Court for the Eastern District of Virginia found in favor of defendant shipowner, ruling that the master has no duty to rescue until he knows that a seaman has fallen overboard.[5] On appeal to the United States Court of Appeals for the Fourth Circuit, *held*, reversed and remanded for a new trial. The master has a duty to rescue when he knows or in the exercise of reasonable care should have known that a seaman is missing. *Abbott v. United States Lines*, 512 F.2d 118 (4th Cir. 1975).

The master of a vessel has a general responsibility for the care and safety of his crew while they are aboard ship.[6] This implies a duty on the part of the master to exercise due diligence to protect a seaman from avoidable peril, and to provide assistance should a seaman be threatened by injury or death.[7] When a seaman falls

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Abbott's failure to appear was not so unusual that the master should have been concerned.

5. Therefore, the actions of the master and crew before that discovery were not necessarily negligent. The court submitted to the jury only the question of defendant's negligence after Abbott was discovered missing at 8:00 a.m. The jury found for defendant.

6. *See, e.g.*, The Iroquois, 194 U.S. 240 (1903) (master has duty to provide adequate care for injured seaman, even if seaman does not request it); Mathews v. Halford, 374 F. Supp. 1003 (E.D. La. 1973), *aff'd*, 493 F.2d 663 (5th Cir. 1974) (recognizing that the master has a very high duty of care to his crew, although that duty was not breached on the facts); Pedersen v. Diesel Tankers, Ira S. Sushey, Inc., 280 F. Supp. 421 (S.D.N.Y. 1967) (master breached duty of care by failing to adequately instruct seaman in the use of dangerous equipment). It has been said that the master stands *in loco parentis* to his crew and thus has paternal responsibilities to them. NORRIS § 535.

7. While this duty has always existed, under general maritime law the master (or owner) was not liable to the seaman for compensatory damages for its negligent breach, the seaman's recovery being for maintenance and cure and for unseaworthiness. NORRIS § 657. The seaman's right to compensatory damages was created by the Jones Act, 46 U.S.C. § 688 (1970). The Act incorporates by reference the provisions of the Federal Employees Liability Act (FELA), 45 U.S.C. § 51 *et seq.* (1970), thus making the shipowner liable to the seaman for damages resulting in whole or in part from the negligence of the shipowner's agents or from any defect, due to negligence, in the vessel's equipment. As in actions at common law, a seaman suing to recover in a negligence action under the Jones Act must show "the existence of a duty, the negligent violation of this duty by the employer, and . . . a causal relationship of the violation to the injury sustained." NORRIS § 690, at 377. The criteria for establishing the existence of a duty and its negligent violation are much the same as in common law. The standard of causation under the Jones Act is quite different from that at common law, being taken from § 51 of the FELA. This section makes the employer liable for all injuries resulting in whole or in part from his negligence. Contributory negligence on the

overboard, the master's general responsibility for the safety of his crew crystallizes into a specific duty to rescue. This duty is well recognized, and as a result the issue rarely presents itself to the appellate courts.[8] Prior to 1962, the leading case in the area was *Harris v. Pennsylvania Railroad Co.*,[9] which recognized an implied contractual duty on the part of the master to use every reasonable means to save a seaman who has fallen overboard.[10] In 1962, the same standard was cogently restated in *Gardner v. National Bulk Carriers*,[11] which has tended to serve as a guide for subsequent decisions.[12] The issue usually before the court is whether a given action by the master is sufficient to discharge that duty. As the court said in *Gardner*, the duty involved is less than a duty to effect a rescue, but it does demand a sincere attempt at rescue.[13] Thus, the response required of a master when a seaman is lost

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part of the seaman is not a defense, but merely serves to reduce the recovery to the extent that such negligence contributed to the injury. FELA, 45 U.S.C. § 53.

8. An early case was *United States v. Knowles*, 26 F. Cas. 800 (No. 15540) (N.D. Cal. 1864), which said there could be criminal liability for a failure to rescue. Justice Cardozo recognized the duty in *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 377 (1932). *See, e.g.*, Di Nicola v. Pennsylvania R.R., 158 F.2d 856 (2d Cir. 1946) (master has duty to rescue; whether he used all reasonable means is for the jury); Petition of Trans-Pacific Fishing and Packing Co., 152 F. Supp. 44 (W.D. Wash. 1957) (failure to make any attempt at rescue imposes liability). For a discussion of the history of the rescue doctrine see Bentley, *Shipowner's Responsibility for Rescue at Sea*, 3 J. MAR. L. & COM. 573 (1972).

9. 50 F.2d 866 (4th Cir. 1931).

10. In *Harris*, defendant contended there was no duty to rescue a seaman who falls overboard as a result of his own negligence or misfortune, and not as a result of the negligence of the shipowner or a fellow crewman, by analogy to the law of master and servant. The court said that, regardless of the state of the law with respect to nonmaritime occupations, the peculiar dependence of the seaman imposes on his employer an "exceptional obligation to care for the well-being of the crew" which is evidenced by the responsibility of the employer to provide maintenance and cure for an injured seaman. The court then went on to say that "it was absurd to admit the duty to extend aid in the lesser emergency [injury], and to deny it in the greater [rescue]." 50 F.2d at 868.

11. 310 F.2d 284 (4th Cir. 1962), *cert. denied*, 372 U.S. 913, *rehearing denied*, 372 U.S. 961 (1963).

12. The court in *Gardner* held:

> The survival of a seaman adrift at sea depends in large measure on the diligence of those who are required by law to look after him. If they default in their duty, death is made certain. In recognition of this unyielding truth, the admiralty law annexes to a seaman's contract of employment an obligation on the part of the master to use every reasonable means to save the seaman's life if he goes overboard. 310 F.2d at 286.

13. 310 F.2d at 287.

overboard will vary with the circumstances. In some situations, as when the ship itself is in peril or a rescue attempt is physically impossible, the master may be required to do very little. For example, in *Kiesel v. American Trading*,[14] a seaman fell overboard while his vessel was proceeding down a narrow river channel, where it would have been extremely dangerous for the ship to have attempted to reverse course, as there was a substantial risk that it would have run aground and blocked the channel. The court ruled that in this situation it was reasonable for the master to do nothing more than notify the United States Coast Guard. However, since the seaman's life is at stake, such cases are the exceptions. Thus, the courts have consistently held that the master must exercise the highest degree of care when the safety of the crew is involved and, in particular, that the master must take every reasonable means to rescue a seaman even when the possibility of success is remote.[15] Illustrating the extent of this requirement, the court in *Gardner v. National Bulk Carriers*[16] found the master negligent in failing to search for a crewman who had fallen overboard at an undetermined time up to five and one-half hours before he was first missed. The required search would have entailed retracing the vessel's path over some 100 miles of open ocean. While recognizing the duty to rescue, prior to the instant case the courts had not addressed the precise issue of when the duty to rescue arose. The duty obviously existed once the master obtained certain knowledge that a seaman was lost overboard, but whether it existed before that time was an open question.

In the instant case, the district court had relied in part on ambiguous language in *Gardner*,[17] which the court interpreted to mean that the duty to rescue arises only when the absence of a

14. 347 F. Supp. 673 (D. Md. 1972).

15. One reason for this insistance may be that, under certain circumstances, seamen have been known to survive for several days in the water. In one instance, a seaman was rescued after having been adrift for 56 hours. *See* Petition of Trans-Pacific Fishing and Packing Co., 152 F. Supp. 44 (W.D. Wash. 1957) (master should have attempted rescue, even if it involved some danger to the ship).

16. 310 F.2d 284 (4th Cir. 1962), *cert. denied*, 372 U.S. 913, *rehearing denied*, 372 U.S. 961 (1963). *Gardner* is significant for its treatment of proximate cause in rescue cases, as well as for its articulation of the rescue doctrine. For a discussion of *Gardner* see Annot., 91 A.L.R.2d 1023 (1963); Kelsey, *Shipowner's Duty to Rescue Crewmen—The Gardner Case*, 49 VA. L. REV. 492 (1963); Note, 18 HASTINGS L.J. 981 (1967).

17. 310 F.2d 284 (4th Cir. 1962), *cert. denied*, 372 U.S. 913, *rehearing denied*, 372 U.S. 961 (1963).

seaman is discovered.[18] The court of appeals disagreed with this interpretation, saying that, while this precise issue was not before the *Gardner* court, that decision does not suggest that the absence of a seaman may be disregarded. The court then stated that, since the rescue doctrine is based on the law of negligence, the master's duty under the doctrine is tested by the standard of reasonable care. Therefore, the court held that "if there is a reasonable possibility of rescue, the ship is under a duty to search and attempt a rescue when the officers know or in the exercise of reasonable care should have known a seaman is missing."[19] Since the issue of whether that duty was breached on the instant facts was properly a jury question, the court remanded the case for determination of whether the failure to discover decedent's absence was attributable to the negligence of the vessel's officers.

This case is the first to state explicitly that a master may be deemed negligent for failing to note the absence of a seaman when that failure prevents timely rescue efforts. Prior cases dealt with the adequacy of the master's response after having obtained certain knowledge that a crewman was missing, not with the possibly negligent conduct which prevented him from obtaining such knowledge. The novelty of the instant holding, however, results more from the relative rarity of the fact situation involved than from any departure from established law. Given the structured nature of the shipboard life, the cases in which a seaman is missing under circumstances that imply some notice to the master, but which are not remarkable enough to cause even the most "negligent" master to take action, should be few. Once the situation did occur in *Abbott*, the court's holding followed from a straightforward application of the "known or should have known" standard of negligence[20] to the unquestioned duty of the ship to aid a seaman lost overboard. Hence, the master had a duty to take effective measures to rescue decedent, and since the measures taken were less effective than they might have been had decedent's absence been noted sooner, that omission may have been negligent

18. The language on which the district court apparently relied is: "[t]he duty to rescue arises when there is a reasonable possibility of rescue." 310 F.2d at 286.

19. 512 F.2d at 121.

20. This standard frequently has been applied to actions under the Jones Act. *See, e.g.*, Koehler v. Presque-Isle Transport, 141 F.2d 490 (2d Cir. 1944) (master knew or should have known that a violent seaman posed a danger to a crewmate); Vareltzis v. Luckenbach S.S. Co., 258 F.2d 78 (2d Cir. 1944) (mate knew or should have known of hazard created by icy condition of deck).

and may have contributed to Abbott's death. Both questions are for the jury to decide. Much of the confusion in this case seems to have resulted from the trial court's initial approach to the case as a rescue action. A certain amount of mental gymnastics is required to derive from the general rescue doctrine a duty to search before the absence of a seaman is discovered. The reasoning is much clearer if the problem is approached from the point of view of the master's general responsibility for the care and safety of his crew, which is quite as well established as the duty to rescue.[21] This responsibility necessarily includes a duty on the part of the master to investigate when a seaman is absent under unusual circumstances, since such absence could indicate that the seaman is in extreme danger. It is logical to characterize the master's failure to note decedent's absence as a possible negligent breach of that duty—a breach which prevented the commencement of rescue efforts within minutes after Abbott fell overboard,[22] while there was still an excellent chance of success, and thus conceivably contributed to his death. This analysis provides a clearer basis for the submission of the question of the master's negligence to the jury, and avoids the issues associated with the duty to rescue that the trial court found troublesome.

Edward D. Meyer

21. *See* note 6 *supra* and accompanying text.

22. Assuming, as the court appears to have done, that Abbott fell overboard on the way from his cabin to the engine room.

ALIENS RIGHTS—INDIGENT ALIEN HAS QUALIFIED RIGHT TO APPOINTED COUNSEL AT DEPORTATION HEARING

Petitioner, an indigent native and citizen of Mexico, had been a permanent resident of the United States since 1967. In 1971, on his return from a vacation in Mexico, petitioner was searched and subsequently arrested by United States customs officers at the Mexican border for possessing two grams of cocaine. Petitioner plead guilty to one count of knowingly possessing a quantity of cocaine.[1] He was fined $3,000 and placed on five years probation. Neither petitioner's appointed counsel nor the district court informed him that a narcotics conviction would almost certainly result in his deportation.[2] Subsequently, the Immigration and Naturalization Service (INS) issued an Order to Show Cause and Notice of Hearing charging that because of his conviction petitioner should be deported under section 241(a)(11) of the Immigration and Nationality Act.[3] Petitioner then appeared before the immi-

1. Cocaine is a schedule II controlled substance under 21 U.S.C. § 844(a)(1970). Section 844(a) provides that:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter.

2. *See* Wexler, *The Alien Criminal Defendant: An Examination of Immigration Law Principles for Criminal Law Practices*, 10 CRIM. L. BULL. 289 (1974). The article focuses its principal attention on three cases: United States v. Parrino, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954) (erroneous advice of counsel not reversible error); Vizcarra-Delgadillo v. United States, 395 F.2d 70 (9th Cir.), *cert. denied*, 393 U.S. 957 (1968) (no deprivation of effective counsel); United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971) (erroneous advice of counsel not reversible error). It is noted that despite the resulting harshness, the courts have rather consistently held that vulnerability to deportation is a "collateral" rather than a "direct" consequence of a guilty plea, and that courts accepting guilty pleas need not affirmatively inform alien defendants of the collateral consequences of deportation in order to satisfy Rule 11 or voluntariness requirements. Even clearly erroneous advice by counsel is insufficient cause for relief unless the counsel's incompetence meets the "mockery test." However, erroneous advice from the prosecution or the bench may warrant relief. *See* United States v. Briscoe, 432 F.2d 1351 (D.C. Cir. 1970) (no significant government involvement in alien's decision to enter a guilty plea); Briscoe v. United States, 391 F.2d 984 (D.C. Cir. 1968) (new trial ordered on voluntariness of alien's plea due to erroneous belief that so doing would make deportation available to him).

3. Immigration and Nationality Act, 8 U.S.C. § 1 *et seq.* (1970) [hereinafter cited as Immigration and Nationality Act]. Section 241(a)(11) provides:

> (a) Any alien in the United States (including an alien crewman) shall,

gration judge and requested appointed counsel. This request was denied. After a hearing, petitioner was ordered deported and was denied the option of voluntary departure. Shortly thereafter, petitioner obtained local counsel[4] and filed an appeal with the Board of Immigration Appeals challenging the validity of his Texas conviction. Petitioner's Texas counsel then filed a motion to withdraw the guilty plea[5] asserting that the District Court had not conformed with federal evidentiary rules in accepting the plea because (1) it had not properly determined that there was a factual basis for the plea; and (2) the plea had been made without a full understanding of the possible consequences.[6] The Board of Immigration Appeals dismissed the petition. Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit arguing that an indigent alien has the right to appointed counsel in a deportation proceeding and that any statute seemingly denying this right is unconstitutional.[7] The United States Court of Appeals for the Sixth Circuit *held* affirmed. While an indigent alien has a qualified right to be represented by appointed counsel in a deportation hearing, the hearing officer's failure to appoint counsel does not violate the "fundamental fairness" requirements of due process when the alien admits the allegations in the show cause order, and it does not appear that the presence of an attorney would affect the outcome. *Aguilera-Enriquez v. Immigration and Naturalization Service*, 516 F.2d 565 (6th Cir. 1975).

It has long been accepted that the "refusal by the government to harbor persons whom it does not want" is an attribute of its sovereignty.[8] While recognizing this power, the courts have none-

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upon the order of the Attorney General, be deported who . . . (11) is, or hereafter at any time after entry has been, a narcotics addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to traffic in narcotic drugs . . . .

4. Petitioner was provided with legal counsel through a legal services organization in Michigan who in turn secured counsel in Texas.

5. This challenge was made pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. Rule 32(d) provides:

A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

6. *See* note 2 *supra*.

7. *See* Immigration and Nationality Act § 242(b)(2).

8. Bugajewitz v. Adams, 228 U.S. 585 (1913) (Congress has the power to deport aliens (here a prostitute) whose presence it deems harmful). This right has often been reaffirmed by the courts. *See* Harisiades v. Shaughnessy, 342 U.S. 580

theless been careful to ensure that before being compelled to leave this country aliens receive those protections afforded them by Congress and the Constitution. In noting the severity of deportation, the sixth circuit in *United States ex rel. Brancato v. Lehmann* declared, "Although it is not penal in character, . . . deportation is a drastic measure, at times the equivalent of banishment or exile, for which reason deportation statutes should be given the narrowest of the several possible meanings."[9] Two requirements recognized by the courts in an effort to ameliorate the severity of deportation are the right of an alien to a fair hearing prior to deportation[10] and the demands of procedural due process in any congressionally mandated deportation procedure.[11] At the same

(1952) (alien deported for prior membership in Communist Party); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (laborer deported); Kwai Chiu Yuen v. Immigration and Nationalization Service, 406 F.2d 499 (5th Cir. 1969) (no unconstitutional abridgment of the power of executive clemency). For an excellent discussion of the problems surrounding this question see Haney, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 117 (1970). *See also* Grosh, *Immigrants, Aliens and the Constitution*, 49 NOTRE DAME LAW. 1075 (1974); Cordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 (1961) and HESSE, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262 (1959).

9. 239 F.2d 663, 666 (6th Cir. 1956). *See also* Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966) (deportation for unlawful entry); Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) (government must satisfy its burden of proof in a deportation proceeding); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1962) (deportation for membership in Communist Party).

10. Kwong Hai Chew v. Colding, 344 U.S. 590 (1952) (alien has right to notice and hearing before deportation).

11. Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903) (alien pauper held deportable). There Mr. Justice Harlan noted:

> [The] Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that were in due process of law as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without the opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends . . . . Therefore, it is not competent for . . . any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized. 189 U.S. at 100-101.

time the courts have held that deportation does not constitute punishment for a crime but rather represents the result of an administrative procedure designed to provide for the return of undesirable aliens to their own countries. As a consequence, aliens have not been able to rely on those constitutional protections generally afforded in criminal proceedings. Instead, aliens must place their reliance upon statutory provisions and those requirements of procedural due process enunciated by the courts.[12] Specific statutory provisions concerning an alien's right to counsel at a deportation proceeding are found in sections 242(b)(2)[13] and 292[14] of the Immigration and Nationality Act. Section 242(b)(2) provides that in proceedings to determine deportability "the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."[15] Section 292 affords the alien a similar privilege in proceedings before a special inquiry officer or in any appeal before the Attorney General.[16] The regulations make no provision for appointment of counsel for indigent aliens and no court has seen fit to regard appointment in such circumstances as a constitutionally guaranteed right. In the past indigent aliens have frequently raised this issue on appeal but have met with no success. In *Carbonell v. Immigration and Naturalization Service*,[17] the second circuit found the petitioner's claim to be without merit, relying on the fact that she had chosen to represent herself at a hearing before the special inquiry officer. In a later case, that same court considered the issue raised to be grave, but declined to "express any opinion on the question whether, in a deportation hearing where the furnishing of counsel might have an effect upon the outcome of the *deportation*

See also Wong Yang Sung v. McGrath, 339 U.S. 33, *modified on rehearing*, 339 U.S. 908 (1950) (deportation proceedings must conform with the Administrative Procedure Act, 5 U.S.C. §§ 1001 *et. seq.*).

12. "Deportation however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. Both of these doctrines as original proposals might be debatable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them." Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952). *See also* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) (alien deported for advocating overthrow of government). *See generally* Aberson, *Deportation of Aliens for Criminal Convictions*, 2 PEPPERDINE L. REV. 52 (1974).

13. *See* note 7 *supra*.

14. Immigration and Nationality Act § 292.

15. *See* note 7 *supra*.

16. Immigration and Nationality Act § 292.

17. 460 F.2d 240 (2d Cir. 1972).

hearing itself, indigent aliens are entitled to have counsel furnished at government expense." More recently, the fifth circuit sidestepped the same issue in *Villaneuva-Jurado v. Immigration and Naturalization Service*.[19] There the court ruled that the petitioner had not in fact raised the question of an indigent's right to appointed counsel and concluded that the appointment of counsel "would have been unavailing and hence unnecessary."[20] Similarly, recent decisions of the seventh[21] and ninth[22] circuits contain dicta that suggest a per se rule against providing counsel to indigent aliens. This position is based on the rationale that since deportation proceedings are not criminal in nature, no reliance can be placed upon the constitutional guarantee of right to counsel. It should be noted that in recent decisions, the Supreme Court has extended this right to other non-criminal proceedings.[23] No court has yet decided on the merits whether indigent aliens must be provided counsel in deportation proceedings as a matter of constitutional right.

18. Henrigues v. Immigration and Naturalization Service, 465 F.2d 119, 121 (2d Cir. 1972) (emphasis by court). Earlier second circuit cases had held that requiring aliens to furnish counsel at their own expense was no denial of due process. United States ex rel. Wlodinger v. Reimer, 103 F.2d 435 (2d Cir. 1939) (appellant's inability to cross-examine witness at deportation hearing not unfair); United States ex rel. Ciccerelli v. Curran, 12 F.2d 394 (2d Cir. 1926) (deportation hearing at prison not in violation of statute).

19. 482 F.2d 886 (5th Cir. 1973).

20. *Id.* at 888. In its opinion the court cited the earlier case of *Rosales-Cabellero v. Immigration and Naturalization Service*, 472 F.2d 1158 (1973). There it remanded the case to the INS to either grant petitioner a hearing on the question of her alleged indigency or to vacate its prior judgment and grant petitioner a new hearing with the benefit of appointed counsel. The reasoning behind the court's latter suggestion was based on the fact that she was then represented by a legal services attorney, and the court assumed that the same attorney or some other would be willing to represent the petitioner in new proceedings before the INS.

21. Tupacyupanqui-Marin v. Immigration and Naturalization Service, 447 F.2d 603 (7th Cir. 1971) (no showing by alien of unintelligent waiver of notice of hearing).

22. Murgia-Melendrez v. Immigration and Naturalization Service, 407 F.2d 207 (9th Cir. 1969) (no right to counsel at government expense).

23. Gagnon v. Scarpelli, 411 U.S. 778 (1973). The Court here recognized a right to appointed counsel in probation or parole revocation proceedings. Whether a particular individual merits such counsel will be determined on a case-by-case basis. In *In re Gault*, 387 U.S. 1 (1967), the Court held that in a proceeding to establish "delinquency" a minor must be afforded counsel regardless of his ability to pay.

In the instant decision the court evaluated the petitioner's claim for court-appointed counsel in light of the fundamental fairness requirement of due process. Emphasizing that "if procedures mandated by Congress do not provide an alien with procedural due process, they must yield, and the constitutional guarantee of due process must provide adequate protection during the deportation process,"[24] the court nonetheless found that absence of counsel at petitioner's hearing before the immigration judge "did not deprive his deportation proceeding of fundamental fairness."[25] The court based this finding on the petitioner's failure to raise a defense to the charge that he had been convicted of possessing a controlled substance. He was, therefore, clearly within the purview of section 241(a)(11) of the Immigration and Nationality Act,[26] and "no defense for which a lawyer would have helped the argument was presented to the Immigration Judge for consideration."[27] Moreover, petitioner did have representation at his hearing before the Board of Immigration Appeals. The lack of counsel, therefore, at the earlier proceedings did not preclude "full administrative consideration of his argument" at a later stage.[28] Applying an outcome determinative test and concluding that presence of counsel "could have obtained no different administrative result,"[29] the court held that fundamental fairness had not been "abridged during the administrative proceedings and [that] the order of deportation [was] not subject to constitutional attack for a lack of due process."[30] In a footnote to its opinion, however, the court made it clear that "where an unrepresented indigent alien would *require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's*

24. 516 F.2d at 568.

25. *Id.* at 569.

26. *See* note 3 *supra.*

27. 516 F.2d at 569. In his dissent, Judge DeMascio warns of the dangers inherent in a court's speculating on what defenses an attorney might raise in a deportation proceeding and forcefully argues that the severity of the possible consequences of such proceedings requires appointed counsel in all cases if due process is to be satisfied. "When the government consents to grant an alien residency, it cannot constitutionally expel unless and until it affords that alien due process. Our country's constitutional dedication to freedom is thwarted by a watered-down version of due process on a case-by-case basis." 516 F.2d at 573-74.

28. *Id.* at 569.

29. *Id.* at 569.

30. *Id.* at 569.

expense,"[31] to satisfy the fundamental fairness requirement of due process. In making this distinction the court criticized the contrary position taken by the seventh and ninth circuits[32] that it found to rest "largely on the outmoded distinction between criminal cases (where the sixth amendment guarantees indigenta appointed counsel) and civil proceedings (where the fifth amendment applies)."[33] The court supported its position by citing Supreme Court decisions[34] extending the right to counsel to areas not within the criminal law and thereby undermining "the position that counsel must be provided to indigents only in criminal proceedings."[35]

The decision in the instant case represents a small but significant step forward in the enhancement of constitutional rights of aliens. For the first time a court has recognized that where the indigent resident alien is unable to adequately present his position in a deportation proceeding he must be provided counsel at government expense. Although this privilege is only to be accorded those indigent aliens who would otherwise be unable to adequately present their positions to an immigration judge, the decision is nonetheless significant in that it recognizes that the furnishing of counsel in such cases is required by due process. Unfortunately, the court has not seen fit to extend this requirement to all deportation proceedings but has instead chosen to utilize a case-by-case method of evaluation. Because it requires a determination of the alien's ability to adequately present his position in each case, this procedure may cause more problems than it solves. The problems inherent in such a means of determination may well render this standard cumbersome if not unworkable. Additionally, while the majority cited *Gagnon* and *Gault* as a basis for its decision, it seems to have emphasized the letter rather than the spirit of these rulings in reaching its own conclusion. As the dissent forcefully points out, a deportation proceeding is most certainly "adversary" in nature, and the penalty that may result from an adverse determination is just "as grave as the institutionalization which may follow an *In re Gault* finding of delinquency."[36] Accordingly, if due process requirements are to be satisfied, the courts must recognize

31. *Id.* at 569 (emphasis added).
32. *See* notes 21 and 22 *supra*.
33. 516 F.2d at 569.
34. *See* note 23 *supra*.
35. 516 F.2d at 568-69.
36. *Id.* at 572. *See* note 27 *supra*.

a per se rule requiring appointment of counsel in all deportation proceedings. This would not only be consistent with *Gagnon* and *Gault* but would also ensure that fundamental fairness will be afforded all aliens, without regard to their circumstances, in deportation proceedings. The court's decision in the instant case unlocks the door to constitutional equality in deportation proceedings. It remains to be seen whether this door will be fully opened to afford indigent resident aliens the constitutional protection that courts historically have denied.

Charles S. French

INTERNATIONAL ARBITRATION—BANKRUPTCY—U.N. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS MAKES FOREIGN AWARD A PROVABLE CLAIM WHEN BANKRUPTCY COURT HAS NO JURISDICTION TO ENJOIN FOREIGN ARBITRATION PROCEEDING

Copal Company, a Japanese Corporation, contracted in 1966 to manufacture cameras for Fotochrome, Inc., a Delaware corporation.[1] The contract provided that any dispute arising therefrom would be submitted to the Japan Commercial Arbitration Association (JCAA) in Tokyo for final settlement. One year after the execution of the contract, Copal petitioned the JCAA for arbitration, alleging money due on the contract. While the arbitration was in progress, Fotochrome filed for an arrangement under Chapter XI of the Bankruptcy Act[2] in the District Court for the Eastern District of New York. The bankruptcy court referee enjoined "all *creditors* of the debtor . . . from commencing or continuing any actions, suits, *arbitrations*, or the enforcement of any claim in any Court against this debtor . . . ."[3] Certified copies of the order were delivered to the JCAA; Fotochrome attended no subsequent arbitration sessions. The Japanese arbitration panel decided the stay was ineffective and made an award in favor of Copal.[4] Copal immediately submitted the award as a provable debt[5] in Fotochrome's Chapter XI arrangement proceeding, citing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[6] and a bilateral treaty with Japan that provided for

1. Fotochrome, Inc., a Delaware corporation with offices in the Eastern District of New York, was the product of a 1968 merger of seven corporations. For a history of these seven corporations' difficulties with the Internal Revenue Service see *In re Fotochrome*, 346 F. Supp. 958 (E.D.N.Y. 1972).

2. Bankruptcy Act, § 301 *et seq.*, 11 U.S.C. § 701 *et seq.* (1970) [hereinafter cited as Bankruptcy Act].

3. *In re* Fotochrome, 377 F. Supp. 26, 28 (E.D.N.Y. 1974) (emphasis added).

4. The award was filed in the Tokyo District Court, making it final and conclusive in Japan. "An (arbitral) award shall have the same effect as a judgment which is final and conclusive between the parties." Japan Code of Civil Procedure, art. 800, *as quoted in In re* Fotochrome, 377 F. Supp. 26, 29 (E.D.N.Y. 1974).

5. The belief that the stay was effective apparently induced Copal to file a proof of claim based solely on the award as a "fixed liability" under the Bankruptcy Act § 63(a)(1), rather than seek confirmation of the award and then file the judgment as a proof of claim under § 63(a)(5), requiring "provable debts [to be] reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge . . . ." Fotochrome Inc. v. Copal Co., 517 F.2d 512, 517. *See* 377 F. Supp. at 28.

6. United Nations Convention on the Recognition and Enforcement of Foreign

reciprocal enforcement of arbitral awards.[7] After hearing Fotochrome's objection to allowing Copal's claim, the referee in the bankruptcy proceeding ruled that his injunction had stayed the arbitration but that the bankruptcy court could consider the merits of Copal's claim de novo. On appeal, the district court reversed, holding that Copal was not subject to the bankruptcy court's jurisdiction and, therefore, the arbitration had not been enjoined. The district court ruled that the award was final under Japanese law and that the provisions of the Treaty on Friendship, Commerce and Navigation between the United States and Japan and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards entitled Copal to seek confirmation of its award as a judgment in the United States. On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed. When a foreign arbitration proceeding commenced prior to the filing of a Chapter XI arrangement petition cannot be enjoined because of a lack of personal jurisdiction, an award against the debtor becomes a provable debt under section 63 of the Bankruptcy Act when reduced to judgment in a United States District Court pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its enabling legislation. *Fotochrome, Inc. v. Copal Company*, 517 F.2d 512 (2d Cir. 1975).

The National Bankruptcy Act gives the debtor "a new opportunity in life . . . unhampered by the pressure and discouragement of preexisting debt"[8] by assembling his creditors and settling their

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Arbitral Awards, Sept. 1, 1970, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective Dec. 29, 1970) [hereinafter cited as Convention] *implemented by* Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692, 9 U.S.C. § 201 *et seq.* (1970)[hereinafter cited as 1970 Amendment].

7. Treaty of Friendship, Commerce and Navigation with Japan, Apr. 2, 1953, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (effective Oct. 30, 1953). Article IV, ¶ 2 provides:

> Awards duly rendered pursuant to any . . . contracts [providing for arbitration of disputes], which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy.

[1953] 4 U.S.T. 2063, at 2068, T.I.A.S. No. 2863 at 7. The treaty was held to be self-executing in *Oregon-Pacific Forest Products Corp. v. Welsh Panel Co.*, 248 F. Supp. 903, 910 (D. Ore. 1965).

8. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (garnishment of adjudicated bankrupt's wages enjoined).

claims. The execution of this basic principle takes several forms, including straight bankruptcy, which requires a liquidation of the bankrupt's estate, and less extreme forms that "rehabilitate" the debtor. The "debtor rehabilitation" chapters[9] of the Bankruptcy Act recognize that an insolvent or embarrassed business or individual can sometimes be saved; therefore, liquidation of the estate should be avoided where possible.[10] One method of rehabilitation, the Chapter XI arrangement, allows both natural persons and corporations to petition voluntarily for authorization to offer to unsecured creditors a plan for settlement or extension of debts.[11] The plan may not, however, affect the rights of secured creditors.[12] An arrangement allows the debtor to continue its business, often without interruption and unencumbered by a trustee's costly administration.[13] The debtor is thereby relieved of the immediate pressures of his debts. Like the bankrupt in a straight bankruptcy, the debtor in a Chapter XI arrangement requires protection from creditor suits so that claims can be effectively assembled and a plan presented without hindrance. Therefore, the Bankruptcy Act gives to the bankruptcy courts the power to stay actions by creditors, including actions to enforce liens on the debtor's property.[14] But

9. Bankruptcy Act, Chapters X through XIII provide for corporate reorganizations (11 U.S.C. § 501 *et seq.*), arrangements (11 U.S.C. § 701 *et seq.*), real property arrangements (11 U.S.C. § 801 *et seq.*), and wage earner's plans (11 U.S.C. § 901 *et seq.*), respectively.

10. Adair v. Bank of America Nat'l Trust & Savings Ass'n, 303 U.S. 350, 354 (1938) (conciliation commissioner in composition not liable for disbursements to harvest mortgaged crops). For a brief history of the use of compositions and arrangements to avoid the harsh effects of bankruptcy see S. RIESENFELD, CASES AND MATERIALS ON CREDITORS' REMEDIES AND DEBTORS' PROTECTION 628-39 (1967).

11. Bankruptcy Act, § 306.

12. Bankruptcy Act, § 307.

13. Bankruptcy Act, § 342 provides:

> Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this title, subject, however, at all times to the control of the court and to such limitation, restrictions, terms, and conditions as the court may from time to time prescribe.

Section 343 allows the debtor to continue to operate his business:

> The receiver or trustee, or the debtor in possession, shall have the power, upon authorization by and subject to the control of the court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.

14. Section 11 of the Bankruptcy Act, which is applicable to all bankruptcy proceedings, provides:

lawsuits by creditors are not the only hindrance to debtor relief. Executory contracts between the debtor and a creditor providing that all disputes between the parties shall be submitted to binding arbitration may interfere with the court's prerogative to settle or to supervise the settlement of creditors' claims.[15] Bankruptcy courts, therefore, refuse to enforce such contracts against a debtor, and, where arbitration pursuant to a contract is in progress at the commencement of the bankruptcy proceeding, the court may enjoin the arbitration.[16] The bankruptcy court views the stay of an

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> A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of filing of the petition by or against him, shall be stayed until an adjudication or dismissal of the petition . . . .

Section 314 of the Act, which is applicable only to arrangements, allows the court an additional power in arrangements, that to stay suits to enforce liens on the debtor's property. The distinction is no longer important because the power to enjoin enforcement of liens has been extended to straight bankruptcy cases by FED. BANKR. R. 601(a).

15. *In re* Maimon Publishing Co., 34 Am. Bankr. R. (n.s.) 786 (S.D.N.Y. 1937) (Referee) (court refused to specifically enforce executory contract to arbitrate against trustee in bankruptcy); Kreindler, *The Convergence of Arbitration and Bankruptcy*, 26 ARB. J. (n.s.) 34, 37 (1971). Although executory contracts to arbitrate may interfere with various Bankruptcy Act proceedings, arbitration has long been permitted in bankruptcy. Section 26 of the 1898 Bankruptcy Act first allowed a trustee "pursuant to the direction of the court, [to] submit to arbitration any controversy arising in the settlement of the estate." Except for 1938 amendments extending § 26 to receivers (Act of June 22, 1938, ch. 575, § 1, 52 Stat. 855) the law remained unchanged until superseded by FED. BANKR. R. 919(b) in 1973. Rule 919(b) provides that,

> On stipulation of the parties to any controversy affecting the estate [of the debtor] the court may authorize the matter to be submitted to final and binding arbitration.

Arbitration under § 26 is most commonly and most effectively used as a means of liquidating claims and goes hand in hand with the "reasonable estimation" for liquidating claims permitted under Bankruptcy Act § 57(d). 3 COLLIER ON BANKRUPTCY ¶ 57.15, § 3.3, at 263 (14th ed. 1975). Arbitration is also permissible under § 57(h) to determine the value of securities held by secured creditors.

16. The issue is not completely settled. Bankruptcy Rule 11-44(a), which applies to arrangements, provides that "A petition . . . shall operate as a stay of the commencement or continuation of any other court *or other proceeding* against the debtor . . . ." (emphasis supplied). The Advisory Committee's Note to Rule 11-44 points out that "other proceedings" is meant to include a pending arbitration proceeding within the scope of the automatic stay. The issue has not been litigated. FED. BANKR. R. 11-44(a).

Before the adoption of Rule 11-44 the question was equally unsettled, both for arrangements and for straight bankruptcy. There is apparently no arrangement case on point. Citing a bankruptcy case *In re Markowitz Co.*, (Ref., N.Y.), 6 Am. Bankr. R. (n.s.) 221 (1925), both COLLIER and REMINGTON agree that arbitration

arbitration proceeding as necessary to speedy and effective relief for the debtor under the court's aegis.[17] On the other hand, binding arbitration under contract has become an increasingly accepted alternative to judicial dispute resolution, especially in international commerce.[18] The common law view, which was followed by the overwhelming majority of the states up to 1925,[19] held that contracts to submit future disputes to binding arbitration were void because they circumvented established procedures for judicial dispute resolution.[20] The first major change in this position in the United States came in 1925 when Congress made agreements to arbitrate binding upon the parties and authorized the district courts to stay an action where one of the parties to the action had unjustly refused to arbitrate an issue covered by the contract's arbitration clause.[21] But because of contrary state laws and an initial determination that the 1925 Arbitration Act was procedural in nature,[22] the Act was held not to be binding on state courts nor applicable to diversity cases.[23] Moreover, the Act by its terms did

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is not a "suit" within the meaning of § 11(a) of the Bankruptcy Act, which mandates that pending "suits . . . founded upon a claim for which a discharge would be a release shall be stayed . . . ." However, the referee in *Markowitz* clearly bases his holding on other grounds. 1A COLLIER ON BANKRUPTCY ¶ 11.03, at 1148 (14th ed. 1975); 8 REMINGTON, TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 3257 (6th ed. 1955). *C.f. In re* Muskegon Motor Specialities Co., 313 F.2d 841 (6th Cir. 1963) (bankruptcy court refused to surrender jurisdiction to allow employees to arbitrate claims against debtor-employer under collective bargaining agreement).

17. 8 REMINGTON, TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES, § 3257, at 90 (6th ed. 1955).

18. *See* McMahom, *Implementation of the U.N. Convention on Foreign Arbitral Awards in the U.S.*, 26 ARB. J. (n.s.) 65, 85 (1971).

19. By 1925, only nine states had statutes making executory contracts to arbitrate future disputes valid: Arizona, California, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, and Oregon.

20. For a history of judicial attitudes in the United States and England toward arbitration agreements see *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) (libel for breach of charter party containing arbitration clause). Typical of the cases decided under the common law rule are *J.T. William & Bro. v. Branning Mfg. Co.*, 154 N.C. 205, 70 S.E. 290 (1911) (arbitration clause in contract deprived parties of right to sue and was therefore void) and *Dunton v. Westchester Fire Ins. Co.*, 104 Me. 372, 71 A. 1037 (1908) (arbitration under fire insurance policy clause cannot foreclose judicial determination of insurer's liability).

21. United States Arbitration Act, 9 U.S.C. § 1-14 (1970) [hereinafter cited as 1925 Act].

22. Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1931); HOUSE COMM. ON THE JUDICIARY, H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

23. "In pre-Erie diversity cases the enforcement of an arbitration agreement

not provide for enforcement of foreign arbitral awards.[24] Despite these shortcomings, the Act was a significant change in the treatment of executory contracts to arbitrate future disputes. Three events, *inter alia*, illustrate the movement toward acceptance of these contracts since the Act's passage in 1925.[25] First, numerous states enacted new statutes so that by 1970 executory contracts to arbitrate were enforceable in a majority of states.[26] Secondly, the

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was deemed 'procedural' and state statutes were accordingly held inapplicable." Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 n.3 (2d Cir. 1959). This rule was changed when *Erie Railroad* held that federal courts could not create or apply federal common law in diversity cases but must apply state law. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). In *Guaranty Trust* the Court held that in diversity suits state law must be applied to all questions that are "outcome determinative." Guaranty Trust v. York, 326 U.S. 99 (1945). The effect of these two cases was to make state arbitration law applicable to diversity cases. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956), *rev'g* 218 F.2d 948 (2d Cir. 1955), *rev'g* 122 F. Supp. 733 (D. Vt. 1954) (Vermont law making revocable executory contracts to arbitrate applied in a diversity suit).

24. Sections 3, 4, and 9 of the 1925 Act have been cited, however, in attempts to enforce arbitral agreements or foreign arbitral awards. The attempts have met with mixed results. Because § 4 of the 1925 Act limits the territorial jurisdiction of the district court in compelling arbitration to arbitration that would take place in its own district, most cases have held that the courts are powerless to compel arbitration in a jurisdiction other than the one in which the court is sitting. International Refugee Organization v. Republic S.S. Corp., 93 F. Supp. 798 (D. Md. 1950), *appeal dismissed*, 189 F.2d 858 (4th Cir. 1951) (U.N. agency libelled steamship company for breach of charter party). Where the parties have agreed to arbitrate outside the district, the court will, however, stay proceedings before it pending arbitration. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 70 F.2d 297 (2d Cir. 1934), *aff'd*, 293 U.S. 449 (1935) (stay of proceedings granted in diversity breach of contract action). Two earlier cases holding contra, *The Silverbrook*, 18 F.2d 144 (E.D. La. 1927) (stay to allow arbitration in London pursuant to charter party refused) and *The Beechwood*, 35 F.2d 41 (S.D.N.Y. 1929) (stay to allow foreign arbitration pursuant to a freight contract refused) have been disapproved. Batson Yarn & Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau, 311 F. Supp. 68, 76 (D.S.C. 1970) (stay of proceeding granted; power to stay does not depend on power to compel arbitration). Foreign arbitral awards against an American are enforceable under § 13 of the 1925 Act. Scherk v. Alberto Culver Co., 417 U.S. 506, 511 n.5 (1974); Danielson v. Entre Rios R.R., 22 F.2d 326 (D. Md. 1972) (dicta) (stay to allow foreign arbitration granted; any subsequent award enforceable). All of this is merely of historical interest since Title 9 was changed by the Convention and by its enabling legislation, the 1970 Amendment.

25. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards*, in NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 37, 40-41 (Am. Arbitration Ass'n ed. 1971) [hereinafter cited as Aksen].

26. *Id.* at 41.

Arbitration Act of 1925 was later construed to have created *substantive* federal law applicable to both diversity and federal question cases.[27] Thirdly, the United States became increasingly committed to enforcing foreign arbitral awards through reciprocal enforcement provisions in Treaties of Friendship, Navigation and Commerce negotiated after 1946.[28] As a result of the movement illustrated by these events, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[29] was introduced into a more favorable climate[30] than were previous mul-

27. The Second Circuit was first to announce that view, in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *appeal dismissed*, 364 U.S. 801 (1960) (based on powers over interstate commerce and maritime cases). The Supreme Court ratified that interpretation in 1967, saying, "Federal courts are bound to apply rules enacted by Congress with respect to matters—here a contract involving interstate commerce—over which it has legislative power." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (action for recission of arbitration clause for fraud in the inducement based on diversity jurisdiction). *See* Comment, *International Commercial Arbitration under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 WASH. L. REV. 441 (1972).

28. Walker, *Commercial Arbitration—1946-1957*, in INTERNATIONAL TRADE ARBITRATION 49 (M. Domke ed. 1958) [hereinafter cited as INTERNATIONAL TRADE ARBITRATION]. By 1970, there were eighteen such agreements. Aksen, *supra* note 26, at 41. These include treaties with the Republic of China, Belgium, France, Luxemburg, Federal Republic of Germany, Japan, Israel, Nicaragua, Pakistan, Togo, Thailand, Ireland, Greece, Denmark, Iran, Netherlands, and Korea. *See* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 70 Yale L.J. 1049 (1961); Firth, *The Finality of a Foreign Arbitral Award*, in NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 121 (Am. Arbitration Ass'n ed. 1971).

29. The Convention was the product of the United Nations Conference on International Commercial Arbitration, held in New York City in 1958. For the official records, see U.N.Doc. E/CONF.26/2 (1958); the proceedings are reported in U.N. Doc. E/CONF.26/SR (1958). The Conference is discussed in Domke, *The United Nations Conference on International Commercial Arbitration*, 53 AM. J. INT'L L. 414 (1959).

30. The United States delegation to the Conference recommended against U.S. accession to the Convention. OFFICIAL REPORT OF THE UNITED STATES DELEGATION TO THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION at 22 (1958). The problems that two members of the delegation saw are reflected in Czyzak & Sullivan, *American Arbitration Law and the U.N. Convention*, 13 ARB. J. (n.s.) 197 (1958). Various individuals and groups, however, urged that the Convention would be beneficial to the United States and should be acceded to. ABA INTERNATIONAL AND COMPARATIVE LAW SECTION, 1960 PROCEEDINGS 194; INTERNATIONAL LAW ASSOCIATION, AMERICAN BRANCH, 1959-60 PROCEEDINGS 84. Almost ten years elapsed from the date that the Convention was

tilateral treaties on the subject, none of which had been ratified by the United States.[31] As acceded to by the United States in 1970,[32] the Convention requires that each contracting state recognize arbitral awards as binding and enforce them in accordance with its rules of procedure.[33] The Convention forbids "more onerous conditions" for enforcement of foreign arbitral awards than for domestic awards,[34] and enforcement may be refused only on specified grounds, including a conflict with public policy.[35] Congress then further defined agreements and awards falling under the Convention[36] and gave to the district courts original jurisdiction over

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opened for signature until President Johnson transmitted the Convention to the Senate for its advice and consent. MESSAGE FROM THE PRESIDENT, CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, S. EXEC. DOC. No. E, 90th Cong., 2d Sess. (1968). The Senate's study of the Convention is reflected in SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE CONVENTION ON FOREIGN ARBITRAL AWARDS, S. EXEC. REP. No. 10, 90th Cong., 2d Sess. (1968).

31. Among the conventions to which the United States did not accede were the Geneva Protocol on Aribtration Clauses, *adopted* Sept. 24, 1923, 27 L.N.T.S. 158, *reprinted in* INTERNATIONAL TRADE ARBITRATION at 283, and the Geneva Convention on the Execution of Foreign Arbitral Awards, *adopted* Sept. 26, 1927, 92 L.N.T.S. 302, *reprinted in* INTERNATIONAL TRADE ARBITRATION at 285. The United States also declined to ratify similar conventions among American nations, such as the 1940 Montevideo Treaty of International Procedural Law. *signed* March 19, 1940, *reprinted in* 37 AM. J. INT'L L. 116 (Supp. 1943). Nor has the United States acceded to the Code of Private International Law [codigo Bustamente], *signed* Feb. 20, 1928, 68 L.N.T.S. 111, *discussed in* 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 86 (1941), which provides for enforcement of foreign arbitral awards.

32. The Senate gave its advice and consent to ratification on October 4, 1968. Accession was delayed until the necessary implementing legislation could be prepared. The appropriate bill was approved almost two years later. Act of July 31, 1970, Pub. L. No. 82-25, 84 Stat. 692. For the legislative history of the implementing legislation see SENATE COMM. ON FOREIGN RELATIONS, S. REP. No. 91-702, 91st Cong., 2d Sess. (1970); HOUSE COMM. ON THE JUDICIARY, H.R. No. 91-1181, 91st Cong., 2d Sess. (1970).

33. Convention, art. II(1).

34. *Id.* art. III.

35. Article V(2)(b) provides:

> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Id. art. V(2)(b); *cf* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 117, comment *c* at 340 (1971).

36. The relationship between the parties to the arbitration must be a legal one and commercial in nature. If the parties are United States citizens, the agreement

all award confirmation proceedings[37] as well as the authority to compel arbitration within the parties' agreement and the Convention.[38] Although not based on the Convention, the decision in *Scherk v. Alberto Culver Co.*[39] reflects the extent to which the Convention has enhanced the enforcement of international arbitration agreements. In *Scherk* a German citizen sought to stay a civil suit brought against him by an American purchaser of stock under the Securities Exchange Act of 1934 so that arbitration pursuant to their contract might proceed. In a 5-4 decision, the United States Supreme Court held that an executory agreement to arbitrate a dispute arising from a transaction involving a sale of securities shall be enforced, despite the non-waivability of the right to sue under the Securities Exchange Act.[40] In *Scherk* the Court not only enforced an executory contract to arbitrate, but in doing so compromised a significant public policy expressed in the Securities Exchange Act, that of the non-waivability of the judicial remedy of an injured securities purchaser. Furthermore, not only is the public policy in favor of enforcement strong, but also the grounds for non-enforcement will be narrowly construed.[41]

In the instant case, the Court of Appeals affirmed that the bankruptcy court had no in personam jurisdiction to enjoin the arbitration, either by virtue of territorial jurisdiction or under the minimum contacts doctrine.[42] Faced with the merits of the case,

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or award does not fall within the Convention unless their relationship "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relationship with one or more foreign states." 9 U.S.C. § 202 (1970).

37. 1970 Amendment, 9 U.S.C. § 203 (1970).

38. *Id.* § 206.

39. 417 U.S. 506 (1974). *See* Comment, 8 VAND. J. TRANSNAT'L L. 901 (1975).

40. The Securities Exchange Act, § 29(a), provides: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby, shall be void." Securities Exchange Act, 15 U.S.C. § 78cc(a) (1970).

41. Parsons & Whittemore Overseas Co. v. Société Genéral de L'Industrie Du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974). *See* Comment, 8 VAND. J. TRANSNAT'L L. 935 (1975).

42. International Shoe v. Washington, 326 U.S. 310, 319 (1945) ("contacts, ties or relations"); Hanson v. Denckla, 357 U.S. 325 (1958) ("minimum contacts"). The territorial jurisdiction of the bankruptcy court is set forth in 11 U.S.C. § 11(a) (1970). *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 7 (1965); *see also* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339-42 n.11 (2d Cir. 1972) (U.S. contacts in sale of British securities by British defendants to American Corporation).

the court found that the arbitration award must be recognized as a binding adjudication on the merits for two reasons. First, the plain language of Article III of the Convention mandated that result.[43] Secondly, the court concluded that in some circumstances an in personam suit against the debtor, which is commenced before the bankruptcy proceeding, may be allowed to continue to judgment in a state court, without the participation of the receiver or trustee, the judgment being accepted as an adjudication of the existence of the indebtness.[44] The court found the JCAA arbitration to be an analogous situation and pointed out that the result in this case was even more compelling because Fotochrome had actually participated in the arbitration. Thus both the Convention and case law suggested that the award be recognized as a binding adjudication on the merits and, therefore, unreviewable by the bankruptcy court. This, however, did not settle the issue of the *status* of the award for purposes of the arrangement proceeding. Despite the award's status as a judgment in Japan, the court refused to accord it similar status in the arrangement proceeding. The court found that, as a matter of domestic law, a foreign award can never be self-executing in the forum state.[45] To allow an award to be self-executing would foreclose the party against whom enforcement is sought from challenging the award on the limited grounds specified by the Convention.[46] Therefore, on grounds of

43. "Each Contracting State shall recognize arbitral awards as binding and enforce them . . . ." Convention, art. III.

44. In *Riehle v. Margolies*, 279 U.S. 218 (1929), the Supreme Court concluded that an in personam default judgment on a creditor's bill, commenced before the appointment of a federal equity receiver, established conclusively the existence and amount of the creditor's claim even though the receiver failed to defend. The court emphasized that its holding applied only to equity receiverships because, unlike the bankruptcy court, a federal court sitting in equity could not have enjoined the creditor's suit in a state court under 28 U.S.C. § 379. The instant court also pointed to *Doyle v. Nemerov's Executors*, 223 F.2d 54 (2d Cir. 1955). In that case a state proceeding for allowances to attorneys, which had begun prior to the filing of a Chapter X reorganization petition, continued to judgment after the filing of the petition. No stay had issued to the state court. The court of appeals held that, despite the exclusive jurisdiction of the bankruptcy court over the debtor and his property in Chapter X proceedings (11 U.S.C. § 111), the filing of the petition did not automatically deprive the state court of jurisdiction and that, therefore, the state court judgment was conclusive as to the validity and amount of the claim.

45. Here the court cited Lorenzen, *Commercial Arbitration—Enforcement of Foreign Awards*, 45 YALE L.J. 39, 56 (1935). 517 F.2d at 519.

46. Convention, art. V.

due process, the court found that Copal's award was not a "provable debt" within § 63(a) of the Bankruptcy Act and that the filing of the proof of claim was premature. The court held that in order to reduce the award to judgment (and therefore a provable debt), Copal must seek confirmation in a district court pursuant to the Convention's enabling statutes. The court pointed out that this holding is in no way counter to the Convention's requirements. The Convention, the court said, clearly distinguishes between the contracting state's duties to recognize and to enforce an award. Under the Convention recognition is mandatory; this is satisfied when the award is held to be dispositive of the merits of a claim. Enforcement, however, is conditioned upon satisfaction of the procedural requirements of the forum in which enforcement is sought. In mandating that Copal seek confirmation of the award, the court said that it was merely satisfying a fundamental procedural requirement—the due process right of the losing party to contest the award on the limited grounds available. In so holding the court recognized and enforced in a Chapter XI arrangement proceeding a foreign arbitral award rendered after a bankruptcy referee's unsucessful attempt to stay the arbitration. While acknowledging that its holding had the anomalous result of permitting foreign arbitration against an American debtor to proceed while domestic creditors were precluded from seeking similar relief, the court pointed out that next time the arbitration might be American and the bankrupt Japanese.

The instant case goes further than *Scherk* in compromising domestic policy in order to enforce a foreign arbitral award. Here the court not only allowed the American party to waive determination of his case in an American court, but also allowed the arbitration to affect the rights of American creditors and the interests of the bankruptcy court. This enforcement of a foreign award notwithstanding domestic considerations will increase confidence among the Convention's other contracting states in America's recent commitment to recognize and enforce foreign arbitral awards. Now more certain of an award's enforcement, parties to international commercial contracts can confidently choose to settle their disputes by arbitration and avoid the expense and inconvenience of litigation in a foreign forum. Overall, this lessens the risks involved in international business transactions and encourages straightforward negotiation for convenient and accessible non-judicial remedies for redress of grievances. The effect of the instant decision on domestic procedural law is equally commendable. The court harmonized the procedural requirements of the Bankruptcy

Act, the Convention, and due process without the slightest violence to any of the three. Conspicuously absent from the court's opinion, however, is consideration of the disquieting chasm, apparent in the instant case, between the jurisdictional requirements for effective bankruptcy administration and the incapacity of foreign arbitration to meet those requirements.[47] The very existence of exclusive federal jurisdiction over bankruptcy in the United States argues for the need for no less pervasive an authority to manage such complex and far-reaching disturbances to commerce. But there exists no similar authority to handle cases of financial collapse within the international business community.[48] On the other hand, an arbitration panel in a case such as the instant one is incapable of considering the interests of all affected by its decision. The arbitration, therefore, becomes a proceeding of transnational significance and the enforcement of the award is made other than a matter of equal treatment with domestic awards. In situations like this, the Convention provision allowing non-enforcement as against public policy might be used as a safety valve whereby a particular case not capable of satisfactory consideration or resolution by a foreign arbitral panel might be rechanneled to a traditional judicial body. Admittedly, it is questionable whether the interests protected are worth the high cost in confidence of foreign businessmen destroyed thereby. But the memory of the common law courts' excesses in protecting their parochial interests should not be allowed to obscure abiding interests not so parochial; nor should the advantages of arbitration to international commerce prevent determination of its limitations and the assertion of domestic jurisdiction wherever appropriate.

Ronald M. Morris

47. "This case is not without irony. The treaties force use to remove the factor of alienage in determining the recognition of arbitral awards . . . . But, in terms of injunctive power the common law factor of alienage remains . . . . Copal thus benefits both from the treaties' removal of alienage and from the common law's insistence upon it." 377 F. Supp. at 31.

48. The European Economic Communities has recently produced a draft convention on bankruptcies and insolvency proceedings within EEC countries. For a survey of its provisions and a discussion of some of its difficulties, see Hunter, *The Draft Bankruptcy Convention of the European Economic Communities*, 21 INT'L & COMP. L.Q. 682 (1972).

INTERNATIONAL MONETARY FUND—IN NEW YORK COURTS NATIONALS OF INTERNATIONAL MONETARY FUND MEMBER STATES MAY SEEK TORT DAMAGES FROM PERSONS WHO INDUCED THE FOREIGN NATIONAL TO VIOLATE ITS COUNTRY'S FOREIGN EXCHANGE LAWS

Plaintiff, a private Brazilian bank, brought an action for fraud and sought rescission of a foreign exchange contract[1] and damages against two[2] unnamed defendants. Plaintiff alleged that false currency applications submitted by the defendants induced the bank to violate Brazilian exchange regulations. Both the United States and Brazil are members of the International Monetary Fund (I.M.F.). The Bretton Woods Agreement, which created the Fund, provides that exchange contracts violative of a member state's foreign exchange regulations shall be unenforceable in any other member state and that members may, by mutual accord, develop measures making the Agreement more effective.[3] Plaintiff argued that, in accordance with the Bretton Woods Agreement and on principles of international comity, the state courts of the United States can provide a tort remedy for an alien corporation which was fraudulently induced by nationals of the forum state to violate its country's foreign exchange regulations. Defendant contended that New York courts should not enforce governmental rights of another state created by the foreign exchange laws of that state, that the Bretton Woods Agreement does not authorize recognition of tort claims arising out of the exchange laws of another member

1. The exchange contract resulted in an improper exchange by the bank of Brazilian cruzeiros into travelers checks in United States dollars totalling $1,024,000.

2. The case as reported refers to "20" unnamed defendants, but the Appellate Division refers to only two defendants, and the case specifically refers to two "John Does." 44 App. Div.2d 353, 355 N.Y.S.2d 145 (1974). Therefore it shall be assumed that there was a printing error and there were only two defendants.

3. Articles of Agreement of the International Monetary Fund, *adopted* Dec. 27, 1945, art. VIII, § 2(b), 60 Stat. 1401 (1946), T.I.A.S. No. 1501, 2 U.N.T.S. 39 [hereinafter cited as The Bretton Woods Agreement]. Section 2(b) of Article VIII reads as follows:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

country, and that the court cannot broaden the scope of the Agreement without the official consent of the federal government. The New York Supreme Court, Appellate Division, modified the order of the New York Supreme Court[4] and granted the defendant's motion to dismiss on the ground that the courts of one country do not enforce the currency regulations or the statutory penalties of another. On appeal, the New York Court of Appeals *held* reversed and remanded. When a private corporation incorporated in an I.M.F. member state seeks redress for tortious inducement to violate its country's exchange laws, New York courts can provide a forum for the private tort action in accordance with Article VIII, section 2(b) of the Bretton Woods Agreement. *Banco Frances e Brasileiro S.A. v. Doe,* 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534, *cert. denied,* 44 U.S.L.W. 3205 (Oct. 6, 1975).

The recognition and application of foreign exchange laws raise two issues which the court must consider: (1) whether the law in question should be characterized as a revenue law, whereby a determination must be made as to the applicability of the traditional rule that "no country ever takes notice of the revenue laws of another,"[5] and (2) whether federal or state public policy requires or prohibits the application of the law. The revenue law rule is generally considered as a part of the penal law rule[6] in the United

4. The New York Supreme Court granted plaintiff's motion for ancillary relief (inspection of the bank accounts into which the money had been deposited and disclosure of the identities of the defendants by their attorneys, but dismissed the cause of action for damages). 36 N.Y.2d 592, 331 N.E.2d 502, 503, 370 N.Y.S.2d 534, 537 (1975).

5. Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775). *Holman* held that a French plaintiff could recover under English law on a contract made and executed in France because the subsequent illegal acts of the defendants (smuggling tea into England) did not taint the plaintiff's cause of action. In dictum the court stated that *if* French law were to be applied the French court could not look to the revenue laws of England as a basis for dismissing the cause of action. Therefore the plaintiff had a cause of action in either forum.

6. The penal law rule is: "The courts of no country execute the penal rules of another . . . ." The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825). The following cases illustrate the interrelation between penal and revenue rules: Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 413-14, 448 (1963) (penal and revenue rules do not apply to an expropriation fully executed in a foreign state); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289-91 (1887) (the penal law rule applies to criminal law enforcement as well as to recovery of pecuniary penalities for violations of state revenue protection statutes); Philadelphia v. Cohen, 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188 (1962); A. DICEY & J. MORRIS, CONFLICT OF LAWS 75-79 (9th ed. J. Morris ed. 1973) [hereinafter cited as DICEY & MORRIS]; R.

States; therefore the courts have applied the rules interchangeably,[7] and an analysis of both rules is required. Judge Learned Hand characterized the policy behind these rules as the protection of state sovereignty.[8] Hand explained that the courts of one state are not empowered to execute the penal laws of another because penal laws strike at the core of the relation of sovereign and citizen. There has been discontent with the penal law rule in general and the revenue law rule in particular for some time[9] as shown by the case law[10] and the changes made in the *Restatement (Second) of*

LEFLAR, AMERICAN CONFLICTS LAW 107-10 (1968) [hereinafter cited as LEFLAR, CONFLICTS]; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89, comment *b* at 264 (1971); Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932) [hereinafter cited as Leflar, *Extrastate Enforcement*].

7. Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1887). The penal law rule was applied by the Court in an action by Wisconsin to enforce a Wisconsin penalty for failure to file tax papers against a Louisiana corporation, and Wisconsin's cause of action was dismissed.

8. More v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J. concurring). A political sub-division of Indiana was precluded from collecting taxes in New York because taxes (like criminal liabilities) are a function of state sovereignty and settled principles of private international law preclude one state from enforcing another's penal or revenue laws.

9. *See* Leflar, *Extrastate Enforcements*, *supra* note 6 at 215-17.

10. The term "penal" has been restricted to criminal law in its most literal sense. Huntington v. Attrill, 146 U.S. 657, 667 (1892) (restricting penal claims to those which seek to punish an offense against the public as opposed to claims seeking a private remedy for one injured by the wrongful act of another). Subsequently it was held that when a state agency seeks to recover a primarily compensatory claim in a sister state, such a claim is not penal and full faith and credit should not be denied. New York v. Coe Mfg. Co., 112 N.J.L. 536, 172 A. 198 (Ct. Err. & App. 1934) (franchise tax owed by a corporation to New York for doing business there is not a penalty but rather a debt incurred by the corporation when New York admitted it to do business). The full faith and credit clause has been interpreted to require enforcement of sister state tax judgments. Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) (obligation to pay taxes is not a penal, but rather a statutory obligation). Therefore tax judgments are given the same full faith and credit as other judgments. While the Supreme Court has never ruled on whether full faith and credit should be given a sister state's tax claim not reduced to judgment, some courts have broadened the meaning of *Milwaukee County v. M.E. White Co.* to include such claims. *See, e.g.*, New York v. Shapiro, 129 F. Supp. 149 (D. Mass. 1954) (an uncontested New York City administrative decision as to taxes and tax penalties is entitled to full faith and credit in Massachusetts); State *ex rel.* Oklahoma Tax Comm'n v. Nelly, 225 Ark. 230, 282 S.W.2d 150 (1955) (Oklahoma can maintain an action in Arkansas courts to recover its income tax due, irrespective of Arkansas reciprocity statute); Detroit v. Gould, 12 Ill.2d 297, 146 N.E.2d 61 (1957) (Illinois courts recognize Detroit's personal property tax claim on principles of comity); State *ex rel.* Oklahoma Tax Comm'n

Conflict of Laws.[11] In *Milwaukee County v. M.E. White Co.*,[12] the Supreme Court recognized the right of a state to enforce a tax judgment of a sister state but left open the question of whether a tax assessment not reduced to judgment could be enforced. When that very situation arose in New York, the court in *Philadelphia v. Cohen*[13] applied the traditional penal law analysis but denied recovery on the basis of the legislative policy stated in New York's reciprocal tax statute.[14] In its analysis of the penal law rule, the court found there was no requirement that it apply Pennsylvania law, but the court did not say that the revenue law rule prohibited the application of the sister state's law. The New York court has, therefore, left open the possibility that, under different circumstances with different policy considerations, the court could enforce a revenue law of another state. The *Restatement (Second) of Conflict of Laws* is also indicative of the trend away from the broad use of the penal law rule. Section 89 of *The Restatement (Second)* clarifies the ambiguities in the *Restatement of Conflict of Laws*, section 611, by narrowing the scope of the rule to actions brought by the *state* in a sister state's forum to recover a fine for a violation of its *criminal*[15] law. Because the cases are divided, the

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v. Rogers, 283 Mo. App. 1115, 193 S.W.2d 919 (1946) (revenue laws are not within the meaning of the penal law rule, and because Missouri has no public policy against income tax, it will enforce Oklahoma's tax claim). Arguably, tax claims fall within the "public acts" standard of *Hughes v. Fetter*, 341 U.S. 609 (1951). The Supreme Court held that the Illinois wrongful death statute was a "public act" within the meaning of the Constitutional provision that "full faith and credit shall be given in each state to the public acts . . . of every other state." 341 U.S. at 611. On that basis, full faith and credit should be extended to tax claims by sister states. *See also* H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 99-100 (4th ed. 1964) [hereinafter cited as GOODRICH]; LEFLAR, CONFLICTS, *supra* note 6, at 108-09, 203-04, 641-43. *But see* Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954).

11. *See* note 15 *infra* and accompanying text.

12. *See* note 10 *supra*.

13. 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188 (1962) (finding the Pennsylvania tax assessment penal and no law in Pennsylvania corresponding to New York RECIPROCAL ENFORCEMENT OF TAX LIABILITIES ACT §§ 901-903 (McKinney 1975), the court held the tax assessment unenforceable in New York).

14. The court gave considerable weight to the legislative policy announced in New York's reciprocal tax enforcement act. These acts have been a means to avoid the revenue law rule and to apply the more reasonable policy that tax evasion should not go unpunished in the courts merely because the taxpayer has left the state in which the taxes are owed. *See* Leflar, *Extrastate Enforcement*, *supra* note 6, at 202; GOODRICH, *supra* note 10, at 99-100.

15. Section 611, comment *a* of the *Restatement of Conflict of Laws* defines a

Restatement Second offers no opinion whether tax claims of one state should be enforced by another state.[16] In *Banco do Brasil v. Israel Commodity Co.*,[17] the New York court denied the bank a remedy for tortious inducement to violate Brazilian exchange regulations because (1) it was a government instrumentality,[18] (2) the court had characterized the rule as a revenue law,[19] and (3) Article VIII, section 2(b) of the Bretton Woods Agreement did not provide for affirmative tort actions.[20] Because of the presence of the foreign government instrumentality in the case it did not provide a good opportunity to begin the erosion of the revenue law rule.[21] The second element to be considered by the court when applying foreign law is public policy. The policy considerations relating to the

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penalty as including money exacted for the punishment of a civil wrong (as distinguished from compensation for a civil wrong). The *Restatement (Second)*, limited to criminal wrongs, makes a clearer and more rational distinction. For a discussion of the advantages of the criminal limitation see Leflar, *Extrastate Enforcement*, *supra* note 6, at 225.

16. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Explanatory Notes § 89, comment *b* at 264 (1971).

17. 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872, *cert. denied*, 376 U.S. 906 (1964) (a Brazilian government instrumentality, the Bank of Brazil, cannot maintain an action in tort for damages resulting from fraudulent inducement to violate the foreign exchange regulations of Brazil).

18. "No state is entitled directly or indirectly to enforce outside its own territory its prerogative rights or public laws." F. MANN, THE LEGAL ASPECTS OF MONEY 428 (3d ed. 1971). *See* Williams, *Extraterritorial Enforcement of Exchange Control Laws Under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319, 373 (1975).

19. There is authority that this was an improper characterization. Kahler v. Midland Bank Ltd., [1950] A.C. 24, 36; DICEY & MORRIS, *supra* note 6, at 917.

20. Article VIII, section 2(b) specifically mentions exchange contracts and mutual accords which make the agreement more effective, but there is no language which requires the courts of one country to enforce the monetary tort claims of another member country. *See* note 3 *supra*.

21. *Huntington v. Attrill*, 146 U.S. 657, 673-74 (1892), distinguished an action by a state seeking to "punish an offense against the public justice of the state" from the action by a private citizen seeking redress for a wrongful act. The state action was termed penal and the private action was considered non-penal. Following this decision, some courts distinguished laws as penal on the basis of whether they granted rights to the government (or a subdivision thereof) or a private individual. This was particularly true with tax claims. *E.g.*, Philadelphia v. Cohen, 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188 (1962) (Pennsylvania not allowed to enforce a tax claim in New York); Colorado v. Harbeck, 232 N.Y. 71, 133 N.E. 357 (1921) (Colorado not allowed to collect Colorado inheritance taxes in New York on an estate distributed in New York). *See* LEFLAR, CONFLICTS, *supra* note 6, at 108.

decision of whether to and how to apply the Bretton Woods Agreement are unique. Some courts have resorted to conflicts law to determine what emphasis if any should be given to foreign law in cases involving contracts with foreign countries.[22] Other courts have found foreign exchange regulations contrary to some local public policy, such as the policy that no state enforces the revenue laws of another state.[23] In contrast to these two approaches the Executive Directors of the I.M.F. interpreted Article VIII, section 2(b) to mean (1) that a member country shall not ignore the exchange control regulations of another member on the grounds that they conflict with the public policy of the forum, and (2) that the exchange regulations of another member state cannot be ignored because the law of which they are a part is deemed inapplicable according to the forum's choice of law rule.[24] In support of the Directors' position the United States has bound itself to give effect under its domestic laws to the undertaking in Article VIII, section 2(b) of the Agreement.[25] Although the Bretton Woods Agreement has been referred to by United States courts, no court has specifically adopted the Executive Directors' interpretation. The closest the courts have come to such a far reaching application is the Supreme Court's directive in *Kolovrat v. Oregon*[26] where the Court stated that the Bretton Woods Agreement established a national

22. Perutz v. Bohemian Discount Bank, 304 N.Y. 533, 110 N.E.2d 6 (1953) (when a pension contract was made and intended to be executed in Czechoslovakia, Czechoslovakian law applies).

23. Banco do Brasil v. A.C. Israel Commodity Co., 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872, *cert. denied*, 376 U.S. 906 (1964).

24. The letter from the Executive Directors interpreting Article VII, section 2(b). I.M.F. ANNUAL REPORT OF THE EXECUTIVE DIRECTORS 82-83 (1949). The authority for such an interpretation is found in Article XVIII (a) of the Agreement, which provides: "Any question of interrelation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision . . . ." *See* note 3 *supra*.

25. Article XX, section 2(a) provides: "each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement." *See* note 3 *supra*. The United States incorporated the first sentence of Article VIII, section 2(b) into the statute law of the United States by the Bretton Woods Agreements Act, 22 U.S.C. § 286h (1970).

26. 366 U.S. 187 (1960) (state courts cannot refuse to give recognition to foreign exchange regulations on the basis that enforcement of such regulations would risk decreasing the size of an estate in probate).

policy which the state courts must respect. The New York cases which have dealt with the Agreement have been decided on both an interpretation of the Agreement and either the choice of law or public policy grounds.[27] The division of opinion over how broadly Article VIII, section 2(b) should be applied is best illustrated by the two interpretations of the *Perutz v. Bohemian National Bank* case.[28] *Perutz* held that a pension contract made in Czechoslovakia, with the intent that it be executed there, was governed by Czechoslovakian law, and the exchange regulations that prohibited distribution of funds to nonresidents were applicable because they were in accord with United States policy as evidenced by the Bretton Woods Agreement. One interpretation of this case is that because the court did not rely specifically on Article VIII, section 2(b) of the Agreement the court did not want to be restricted to the "exchange contract" language.[29] Instead, the court was saying that the Agreement is also controlling policy on cases not fitting within the "exchange contract" language.[30] The alternative, and more limited, view is that the court's decision was based on Article VIII, section 2(b); therefore the case must be construed as falling

27. Banco do Brasil v. A.C. Israel Commodity Co., 12 N.Y.2d 371, 190 N.E.2d 236, 239 N.Y.S.2d 872, *cert. denied*, 376 U.S. 906 (1964) (Brazilian Bank denied a remedy for tortious inducement to violate Brazilian exchange regulations (1) because affirmative tort actions are not within the scope of the Bretton Woods Agreement, and (2) because the courts of no state enforce the revenue laws of another); Perutz v. Bohemian Discount Bank, 304 N.Y. 533, 110 N.E.2d 6 (1953) (pension contract unenforceable in New York (1) because enforcement would violate the purpose of the Bretton Woods Agreement, and (2) because private international conflict of laws rules direct New York to apply Czechoslovakian law); Southwestern Shipping Corp. v. National City Bank of New York, 11 Misc. 2d 397, 173 N.Y.S.2d 509 (Sup. Ct. 1958) (contract designed to avoid Italian exchange control held unenforceable (1) because enforcement would be contrary to the Bretton Woods Agreement and (2) because New York will not enforce illegal contracts); Kraus v. Zivnostenska Banka, 187 Misc. 681, 64 N.Y.S.2d 208 (Sup. Ct. 1946) (funds deposited in Prague, with no provision to the contrary, are not payable in the United States (1) because the exchange law of Czechoslovakia governs according to conflict of laws rules, and (2) in passing the court recognizes that this result conforms with the requirements of the Bretton Woods Agreement).

28. *See* note 22 *supra*.

29. *See* note 3 *supra*.

30. Gold, *The International Monetary Fund and Private Business Transactions: Some Legal Effects of the Articles of the Agreement*, INT'L MONETARY FUND PAMP. SERIES No. 3 (1965) [hereinafter cited as Gold]; Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319 (1975).

within the "exchange contract" language.[31] *Banco do Brasil*[32] impliedly limits *Perutz* to the more limited interpretation. In *Banco do Brasil* the court found that Article VIII, section 2(b) did not require that a forum be provided for a government instrumentality of an I.M.F. member. In so holding the court distinguished *Perutz* as a contracts case and characterized the facts at hand as requiring the enforcement of a foreign revenue rule.[33] A court not only looks to the public policy of the state in which it sits, but in any case touching on international relations, the state court must also consider the policy of the federal government. The Supreme Court has generally deferred to the executive branch on all policy issues touching international relations.[34] The position of the United States as to Article VIII, section 2(b), expressed in a brief from the Solicitor General which was requested by the Supreme Court before denying certiorari in *Banco do Brasil*, is that nothing in the Agreement requires state courts to give a remedy in tort based on exchange violations in other member countries.[35]

The court in the instant case concluded that the penal law rule was neither precedentially nor analytically justifiable. The court found that the origin of the rule at common law was dicta in a case concerned primarily with the effect of revenue laws on international commerce, and only hypothetically concerned with the enforcement of revenue laws.[36] In addition it was found that the analytical basis of the rule has been eroded both by scholars who have expressed doubt as to the soundness of the rule,[37] and by court decisions which have enforced tax assessments as well as tax judgments. The court went on to distinguish the instant case from

31. F. MANN, THE LEGAL ASPECTS OF MONEY 433 (3d ed. 1971); Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953). It should be noted that these authors do not take the same position on the interpretation of the term "exchange contract."

32. *See* note 17 *supra* and accompanying text.

33. 12 N.Y.2d 371, 377, 190 N.E.2d 235, 237, 239 N.Y.S.2d 872, 875 (1963).

34. Gorun v. Fall, 393 U.S. 398 (1969) (per curiam); Zschernig v. Miller, 389 U.S. 429 (1967); Kolovrat v. Oregon, 366 U.S. 187 (1960); United States v. Belmont, 301 U.S. 324 (1936) (New York could not maintain its own public policy in its own courts contrary to the federal policy inherent in the Litvinov Assignments).

35. Brief by Solicitor General as *amicus curiae* for the Supreme Court on, Banco do Brasil v. A.C. Israel Commodity Co., 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1964), *as cited in* Gold at 30-31, *see* note 30 *supra*.

36. Holman v. Johnson, 98 Eng. Rep. 1120 (K.B. 1775).

37. Leflar, *Extrastate Enforcement*, *see* note 6 *supra*.

Banco do Brasil on the basis that the plaintiff in that case was an instrumentality of the Brazilian government, whereas the plaintiff in this case was a private party. The court reasoned that with private parties the policy of protecting the sovereign does not apply; therefore the rationale of the penal law rule would be inapplicable. The court found that Article VIII, section 2(b) of the Bretton Woods Agreement was applicable to the case. Because there is nothing in Article VIII, section 2(b) that prohibits recognition of a tort claim arising out of an exchange law violation, and because the United States has a policy of cooperation with the Bretton Woods signatories, the court provided a forum and a remedy for the Brazilian bank. The dissenting opinion applied the rationale of *Banco do Brasil* and found that (1) the penal law rule was applicable and precluded the court from providing a forum, (2) the Bretton Woods Agreement should be narrowly construed as applying only to "exchange contracts" and not as providing a new cause of action, and (3) without a federal policy specifically broadening the scope of the Agreement the courts of one state should not take the responsibility for expanding the scope of the Agreement in United States courts.

The court in the instant case made two modifications of existing New York law: (1) it eroded the revenue law rule to the extent, at least, that it is inapplicable to the enforcement of foreign exchange regulations by private parties; and (2) the court expanded the scope of the Bretton Woods Agreement in New York. While the court's analysis of the revenue rule may indicate that the New York courts are dispensing with the rule, the case of *Philadelphia v. Cohen* still stands as good law. Therefore, it is difficult to say how far the courts will expand this case. A practical result of the court's action is an increased predictability in foreign exchange dealings[38] since there is now more assurance that the exchange regulations of an I.M.F. member state will be applied in the New York courts. In addition to limiting the revenue rule, the court expanded its application of the Bretton Woods Agreement. This helps to clarify what the New York courts are doing in this area. First, the case revitalizes *Perutz* to the extent that commentators have interpreted it to mean that actions other than those involving "exchange contracts" are within the meaning of the Agreement.[39]

38. Cabot, *Exchange Control and the Conflict of Laws: An Unsolved Puzzle*, 99 U. PA. L. REV. 476 (1951); Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953).

39. *See* note 31 *supra*.

Secondly, *Banco do Brasil* has been limited to the specific fact that a government instrumentality will not be permitted to enforce its own laws in another country. These two results indicate that the private plaintiff having dealings affected by exchange regulations of an I.M.F. member state has a forum in which it can seek a remedy if exchange regulations raise an issue to be adjudicated. The Solicitor General's opinion, relating to *Banco do Brasil* which indicated that courts are not required to provide a remedy,[40] coupled with this case, leaves the impression that courts are not precluded from providing a remedy in tort for fraudulent inducement to violate a foreign state's exchange regulations. This indicates that the interpretation of Article VIII, section 2(b) can be as broad or as narrow as the state court wants, with the caveat that the national policy, as expressed in *Kolovrat*, is that the Agreement, where applicable, cannot be ignored.

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40. *See* note 35 *supra*.